

**ATTORNEY-CLIENT PRIVILEGED COMMUNICATION**

**An Analysis of the Legality and Viability of Mineral Leases Granted  
to W.T. Burton and James A. Noe During the Years 1934-1936**

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**Prepared for the Louisiana State Mineral and Energy Board**

**Louisiana Department of Justice  
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### **Executive Summary**

In November of 1934, former Louisiana Governors Huey P. Long, Oscar K. Allen, and James A. Noe, along with several associates, formed the Win or Lose Corporation, “to acquire, sell, trade and exchange lands and leases for the drilling and prospecting for oil, gas and other minerals,” among other things.<sup>2</sup> During the course of the following several years, Win or Lose Corporation acquired interests in several mineral leases on land owned by the State of Louisiana, some of which are still in operation today. For the past 79 years, the former governors and their descendants and assigns profited off of the lessees’ share of royalties paid from these State mineral leases. This profiting has been perceived by some as the result of an unjust enrichment by a select few politically-connected individuals to the financial detriment of the State of Louisiana. This perceived unjust enrichment led, in 2012, to a series of investigative reports on the historical dealings of the Win or Lose Corporation and the possible adverse financial impacts of those dealings on the State of Louisiana. In response to the reports, the State Mineral & Energy Board requested that the Attorney General conduct an inquiry into these leases and determine, if possible, whether the State was properly compensated for the its share of royalties notwithstanding the actions of these former governors and their associates.

This report details the Attorney General’s inquiry into the Win or Lose Corporation’s historic dealings with the State of Louisiana. Included in this report is a review of the historical context of this matter, a review of past litigation and investigations into the Win or Lose matter, and a comprehensive analysis of the legality and validity of what have become known as the Win or Lose leases. This analysis has led to the conclusion that the leases were granted in accord with the law in force at the time of their issuance and that the State received (and continues to receive) its legally-mandated royalty share of minerals produced from these leases. No evidence

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<sup>2</sup> Win or Lose Corporate Charter.

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has been identified or discovered to support any theory or claim that the Win or Lose leases were illegally obtained or that they have been illegally held. In addition, no evidence has been identified to suggest that the former governors or their heirs and assigns are or have historically received any royalties or other funds that should have been paid to the State from these leases. Finally, this analysis has identified no legal basis for the rescinding or cancelling of the Win or Lose leases and has determined that such a rescission or cancellation, were it legally available, would not be in the best interests of the State of Louisiana. Based upon the foregoing and for the comprehensive reasons set forth in this report, the Attorney General's Office does not recommend the institution of legal action which would seek to invalidate or rescind any of the Win or Lose leases. In fact, this analysis indicates that such legal action would be unsuccessful and would be detrimental to the interests of the State.

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### **I. Introduction**

Pursuant to an official request by the Louisiana State Mineral and Energy Board (“SMEB”),<sup>3</sup> the Louisiana Department of Justice, Office of the Attorney General (“LDOJ”), has undertaken a comprehensive review of certain mineral leases granted by the State during the years 1934 through 1936 to determine whether there is a legal basis upon which to invalidate those leases. This report details the findings of that review. This report, in an effort to present a comprehensive analysis of the legal issues, also includes a discussion of the historic context of the subject leases, including a review of the lives and dealings of the major figures involved in the subject leases, a brief review of the previous inquiries into these leases, and a legal analysis of various potentially viable theories to invalidate these leases. The SMEB resolution giving rise to this review and report was prompted by a series of recent inquiries into the subject leases, as detailed below.

#### **A. Cressionnie Complaint**

In 2007, LDOJ, through the lead author of this report, was approached by Messrs. Keith Cressionnie and Norman Billiot regarding allegations of “title busting” in Louisiana during the early years of oil and gas activity in the State.<sup>4</sup> The interactions with these individuals began as a series of e-mails, followed by an in-person meeting, and ended with another series of e-mails.

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<sup>3</sup> By way of note, the State Mineral and Energy Board and the State Mineral Board are one and the same entity. The latter name was first instituted by Acts 1936, No. 93, and was changed to the former by Acts 2009, No. 196. When referring to this entity in this report, the name of the entity at the time of the reference is used.

<sup>4</sup> “Title busting” seems to be a colloquial term for which we can find no legal definition. In a very rudimentary sense, title busting refers to situations in which mineral speculators review the public records of a particular area and look for title defects. Once they identify these defects, rather than notifying the ostensible owner of the property, they exploit these defects to gain ownership of the property or the mineral rights (typically in a lawful, but underhanded, manner) to the detriment of the ostensible owner of the property. In most cases, the ostensible owner does not learn of this activity for many years, by which time it is often too late to undo their loss of title or mineral interests. This definition is a rough adaptation of an explanation of title busting by Buddy Cotton from the Web site, Mineral Rights Forum, <http://www.mineralrightsforum.com/profiles/blogs/title-busting> (last accessed, Jul. 3, 2013).

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All of the e-mail correspondence between LDOJ (through Seidemann) and Cressionnie is attached hereto as Appendix 1.

Contrary to later assertions, as the e-mails in Appendix 1 indicate, the 2007-2008 communications between Cressionnie and LDOJ related to vague allegations that certain private lands had been illegally appropriated during the first half of the twentieth century – lands in which Messrs. Cressionnie and Billiot apparently had an ancestral interest. Because Messrs. Cressionnie and Billiot alleged that the State was likely losing tax revenue and perhaps some royalties, LDOJ made an attempt to review the allegations during this 2007-2008 period. However, as can be seen from the e-mails with Mr. Cressionnie, his refusal to provide concrete information regarding the allegations made any meaningful inquiry by LDOJ impossible.

During these 2007-2008 communications, there was little, if any, discussion of the subject of this report – the historic leases in which the Win or Lose Corporation acquired an interest. These communications and the one meeting revolved around allegations of largely, if not entirely, private disputes over land and mineral rights that did not relate (in any demonstrable manner) to the interests of the State of Louisiana. Accordingly, when Mr. Cressionnie refused to provide supporting information regarding his allegations as they related to his private claims or to the possibility of impacts to the State, LDOJ's inquiry consequently lost steam and was pursued no further.

### **B. WVUE – Fox 8 News Reports**

Beginning in 2012, the New Orleans Fox affiliate, WVUE (Channel 8), began to run a series of investigative reports entitled, "Dirty Deeds," which were reported by Lee Zurik and were based on allegations by Messrs. Cressionnie and Billiot. The "Dirty Deeds" series, at the time of this writing, includes no less than 23 videos (both television spots and Web-only videos),

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detailing Cressionnie's, Billiot's, and Zurik's inquiries into the historic dealings of former Louisiana governors Huey P. Long, Oscar K. Allen, and James A. Noe, with businessman William T. Burton and the Win or Lose Corporation. LDOJ has created transcripts from the videos aired by WVUE and those documents are attached hereto as Appendix 2. These reports raised new allegations not originally made by Cressionnie and Billiot during their 2007-2008 e-mails and meeting with LDOJ. The gist of the new allegations made in the "Dirty Deeds" stories is that these four men, through a jointly-held corporation, conspired to acquire mineral leases from the State of Louisiana during the years 1934-1936, and, in so doing, defrauded the State and the taxpayers of millions of dollars. The specific allegations of these reports are numerous and are specifically addressed in Appendix 3. However, the high-profile nature of these reports caught the attention of the Louisiana Legislature, which was in session during a large portion of the time that these news reports were airing.

### **C. Louisiana House of Representatives Resolution H.R. 88 of 2012**

In response to the "Dirty Deeds" news series, the Louisiana House of Representatives, through Representatives Patrick Connick and Nick Lorusso, introduced House Resolution 88, which "[r]equest[ed] the attorney general to investigate the validity of mineral lease contracts with the Win or Lose Corporation."<sup>5</sup> This resolution was referred to the House Judiciary Committee on May 9, 2012, where it was considered on May 17, 2012. The resolution, after debate that considered multiple historic examinations of the allegations raised by the "Dirty Deeds" stories, was ultimately defeated by the Committee on a vote of two (2) to twelve (12).<sup>6</sup>

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<sup>5</sup> H.R. 88, 2012 Louisiana Legislative Session, at 1. A copy of H.R. 88 is attached hereto as Appendix 4.

<sup>6</sup> The voting record for H.R. 88 is attached hereto following the text of the resolution in Appendix 4.



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### **D. Louisiana State Mineral and Energy Board Resolution**

Concurrently with the Legislature's consideration of H.R. 88, Messrs. Cressionnie and Billiot requested to be heard by the SMEB on the "Dirty Deeds" issues. The SMEB, during its Legal and Title Controversy Committee hearings, heard testimony from Messrs. Cressionnie and Billiot on May 9, 2012, in which the former recounted the basic allegations contained within the "Dirty Deeds" stories and then requested that the SMEB investigate those allegations.<sup>7</sup> The SMEB staff, through the Petroleum Lands Director, Frederick D. Heck, supported this request and proposed that the SMEB pass a resolution "mirroring" H.R. 88. Board Member Tom Arnold made a motion to issue such a resolution requesting that the Attorney General,

investigate mineral lease contracts involving the Win or Lose Corporation as well as the assignment of the rights associated with those contracts to determine if those contracts and assignments were valid when originally executed, if those contracts and assignments are currently valid, and whether the royalties and other profits disbursed pursuant to the contracts are recoverable by the state.<sup>8</sup>

The motion passed that day and the SMEB issued a resolution requesting the same to the Attorney General with a deadline of January 1, 2013. This Resolution was not rescinded by the SMEB when H.R. 88 failed to pass in the Legislature. Based upon the complexity of the issues presented for review, on December 12, 2012, LDOJ sought a four-month extension of the due date of the SMEB-requested report. This request was granted, setting a due date for this report on May 8, 2013.<sup>9</sup> Subsequent to this new resolution, LDOJ sought an additional two extensions of the due date of this report, which were granted by the SMEB, setting the final due date for this report on October 13, 2013.<sup>10</sup>

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<sup>7</sup> An unofficial transcript of the pertinent portion of the SMEB's Legal and Title Controversy Committee meeting of May 9, 2012, is attached hereto as Appendix 5. In addition to the May 9, 2012 meeting transcript, Appendix 5 also contains unofficial transcripts from the December 12, 2012, April 10, 2013, and July 10, 2013, meetings of the SMEB Legal and Title Controversy Committee.

<sup>8</sup> SMEB Resolution at 1. A complete copy of the Resolution is attached hereto in Appendix 6.

<sup>9</sup> A copy of the December 12, 2012, SMEB Resolution is attached hereto as Appendix 7.

<sup>10</sup> Copies of the April 10, 2013, and July 10, 2013, resolutions are attached hereto in Appendix 7.

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### **II. What is Win or Lose Corporation?**

The Win or Lose Corporation (also sometimes herein referred to as “Win or Lose”) was founded on November 20, 1934. According to its Articles of Incorporation, the purpose of the corporation was to “acquire, sell, or exchange lands and leases for the drilling and prospecting of oil, gas, and other minerals.”<sup>11</sup> The president of the corporation is listed as James A. Noe of Monroe, Louisiana; the vice-president as Seymour Weiss; and the secretary-treasurer as Earle Christenberry. Ten thousand dollars were invested as the initial capital stock of the corporation, comprising one-hundred shares. According to later documents, Seymour Weiss and Earle Christenberry held one share each, with the remaining ninety-eight shares being held by James A. Noe.<sup>12</sup>

The question of the corporation’s alleged impropriety comes from the relationship of Win or Lose to then-current and former State government officials and the subsequent transfer of shares to Senator Huey P. Long and Governor Oscar K. Allen, as well as several other select individuals. Specifically, as to the corporation’s officers, James A. Noe, the president of Win or Lose Corporation, was Louisiana’s Governor for three and a half months,<sup>13</sup> following the unexpected death in office of Oscar K. Allen;<sup>14</sup> Seymour Weiss was one of Huey P. Long’s oldest confidants and managed his campaign war chests;<sup>15</sup> and Earle Christenberry was Huey Long’s personal secretary.<sup>16</sup>

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<sup>11</sup> A copy of the Win or Lose Corporation’s Articles of Incorporation and all other materials related to the corporation on file with the Louisiana Secretary of State are attached hereto as Appendix 8.

<sup>12</sup> Testimony of Earle J. Christenberry, Trial Transcript at 92, *United States v. Noe*, Docket No. 20,070 (E.D. La.). The entirety of the transcript as it was available from the James A. Noe Papers at the University of Louisiana, Monroe, is reproduced as Appendix 9. *See also* T. Harry Williams, HUEY LONG, 825 (Knopf 1970).

<sup>13</sup> Noe had also served as the Lieutenant Governor of Louisiana and as a State Senator. Alex McManus, THE POLITICAL CAREER OF JAMES A. NOE, 11 (M.A. Thesis, University of Louisiana at Monroe 2005).

<sup>14</sup> *Id.* at 44.

<sup>15</sup> Richard D. White, KINGFISH: THE REIGN OF HUEY P. LONG, 80 (Random House 2006).

<sup>16</sup> William Ivy Hair, THE KINGFISH AND HIS REALM, 232 (Louisiana State University Press 1991).

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The individuals that played a role in the Win or Lose Corporation's history are legendary in Louisiana, and, no doubt, it is their sometimes dubious nature that has colored perceptions of the validity of the mineral leases that ultimately ended up as partially held by those individuals and the corporation over the years. In fact, as noted by historian J. Eric Pardue, the Win or Lose Corporation's involvement in mineral leasing from the State of Louisiana was "of questionable morality but complete legality."<sup>17</sup>

What is also apparent in the historical treatments of the Win or Lose Corporation is a tendency for temporal relationships among and between activities to be ignored or otherwise glossed over. One important example of this also comes from Pardue, when he comments that "...the thirty-one shares Noe gave Huey earned \$62,000 for the governor in the first year of ownership."<sup>18</sup> Although the amounts in this quotation may be correct, the implication in the quote is that Long was governor when the shares and money were received. He was not. In fact, the Win or Lose Corporation was not formed until two years after the end of Long's only term as governor. Thus, the implication that Long, as a sitting governor, was given shares of this corporation that was making money from State leases is simply incorrect.<sup>19</sup> Indeed, as Earle Christenberry later testified in the tax evasion trial of James A. Noe, the Longs gained their title ownership interest in their own name in the Win or Lose Corporation by way of a stock issuance to Mrs. Huey P. Long in 1936.<sup>20</sup> However, Christenberry also testified that Long had held one of

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<sup>17</sup> J. Eric Pardue, *Jimmie, Huey, Sam, and Earl: Longism in James A. Noe's 1940 Gubernatorial Campaign*, 37(2/3) NORTH LOUISIANA HISTORY 102, 105 (2006). The findings of this report corroborate Pardue's assessment of the Win or Lose Corporation.

<sup>18</sup> *Id.* at 104-105.

<sup>19</sup> It should be noted, however, that O.K. Allen was a sitting governor when he received shares in Win or Lose and James A. Noe was a sitting State senator and lieutenant governor when he received shares of Win or Lose.

<sup>20</sup> Testimony of Earle J. Christenberry, Trial Transcript at 104-105, *United States v. Noe*, Docket No. 20,070 (E.D. La.). This is not to suggest that Huey Long did not have a substantial role in the formation of the company just prior to his death. He did. According to the testimony of Alfred D. Danziger, Huey Long was present at the signing of the Win or Lose charter in 1934 and, though he was not an owner of the company, he certainly provided advice to James A. Noe regarding the original development of State Lease 309. For the former, *see* Testimony of Alfred D.

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the stock certificates issued to Noe (one for 31 shares) during his lifetime and that the same was part of Long’s succession.<sup>21</sup> Oscar K. Allen also, according to Christenberry, held a stock certificate issued to Noe (for 12 shares) during his lifetime and that those stocks were part of Allen’s succession.<sup>22</sup> In fact, although the original incorporators are shown as James A. Noe, Seymour Weiss, and Earle J. Christenberry, IRS Intelligence Agent Frank W. Lohn succinctly summarized the ownership of the Win or Lose Corporation in his testimony in the matter of *U.S. v. Noe*, thusly:

Mr. Noe said that when the company was first organized, he owned 98 shares, Mr. Weiss, one share and Mr. Christenberry, one share, that immediately afterwards the stock was split up so that Senator Long owned 31 shares, he [Noe] owned 31 shares, Mr. Weiss 24 shares, Governor Allen 12 shares, and Mrs. Alice Lee Grosjean, one share, and Mr. Christenberry, one share.<sup>23</sup>

Lohn’s recitation of the division of Win or Lose Corporation shares was also supported during the same trial by explanations from Earle J. Christenberry. Christenberry’s description of the share allocation for the Win or Lose Corporation is contained within Table 1.

**Table 1. Original and Ultimate Stock Issuances for Win or Lose Corporation Based Upon the Trial Testimony of Earle J. Christenberry in *U.S. v. Noe***

<b>Certificate</b>	<b>Shares</b>	<b>Original Recipient</b>	<b>Ultimate Recipient<sup>24</sup></b>	<b>Pages<sup>25</sup></b>
1	23	James A. Noe	Seymour Weiss	117-118
2	12	James A. Noe	Children of O.K. Allen	120-122
3	31	James A. Noe	Mrs. Huey P. Long	122

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Danziger, Trial Transcript at 86-88, *United States v. Noe*, Docket No. 20,070 (E.D. La.), and for the latter see Testimony of Leonard M. Levy, Trial Transcript at 49-54, *United States v. Noe*, Docket No. 20,070 (E.D. La.).

<sup>21</sup> Testimony of Earle J. Christenberry, Trial Transcript at 105-106, *United States v. Noe*, Docket No. 20,070 (E.D. La.). This reality is corroborated by the information in Huey P. Long’s succession, Succession of Huey P. Long, Docket No. 215-671, Division B (CDC, Orleans Parish, 1936-1938), which is attached hereto as Appendix 10.

<sup>22</sup> *Id.* at 106-107. This reality is corroborated by Oscar K. Allen’s succession, *Succession of Oscar Kelly Allen, Deceased*, Docket No. 777 (8<sup>th</sup> JDC, Winn Parish 1936), the relevant portions of which are attached hereto as Appendix 11.

<sup>23</sup> Testimony of Frank W. Lohn, Trial Transcript at 248, *United States v. Noe*, Docket No. 20,070 (E.D. La.).

<sup>24</sup> Where there is no ultimate recipient identified in this column, this means that the original individual identified on the stock certificate retained that certificate and it became part of his patrimony for him to retain or divest, in whole or in part, as he deemed proper.

<sup>25</sup> This column refers to the trial transcript pages on which Christenberry references the specific stock certificates.

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4	31	James A. Noe	-	122
5	1	James A. Noe	Alice Lee Grosjean	117
6	1	Seymour Weiss	-	116
7	1	Earle J. Christenberry	-	116
8	31	Mrs. Huey P. Long (exchange for #3)	-	104
9	12	Mrs. O.K. Allen (exchange for #2)	Cancelled	107-108
10	23	Seymour Weiss (exchange for #1)	-	117-118
11	12	Children of O.K. Allen (exchange for #2)	-	120-121

Further, from speculation in academic sources such as Jeansonne’s comment that “[p]rofits that should have gone to the state went to Long and his cronies,”<sup>26</sup> it is not surprising that the public and the press often develop a misconception regarding whether the State received what it was due under the Win or Lose State leases.<sup>27</sup> The “profits” to which Jeansonne refers are monies realized by the Win or Lose Corporation for the royalties, assignments, or subleases of State mineral leases. The issuance of such assignments and subleases by lessees were not (and are not), as is examined fully, *infra*, unlawful activities, and the financial benefits of those activities were not (and are not) supposed to be escheated to the State. The assumption in Jeansonne’s statement is that, had the State retained the Win or Lose leased areas and had the State successfully leased those areas to others then the State would have received a higher

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<sup>26</sup> Glen Jeansonne, MESSIAH TO THE MASSES: HUEY P. LONG AND THE GREAT DEPRESSION, 160 (HarperCollins 1993).

<sup>27</sup> A classic example of such misconceptions was recently published in THE ADVOCATE. In that piece, an anonymous author noted that,

[Huey] Long held shares in the Win or Lose Corp., which leased mineral rights on state-owned property. The leases did not cost Win or Lose anything because they were turned over to the company by the governor.

Molly Manson, *Meet Uncle Earl*, THE ADVOCATE 12C (Aug. 26, 2013). As is seen herein, Huey Long did own shares of Win or Lose; Win or Lose also held rights in State mineral leases. However, none of the leases, as is developed herein were given at no cost to the company by any governor.

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original lease amount. This statement thus assumes at least two events, neither of which occurred, in order to support a belief that profits were misappropriated to the Long political machine.<sup>28</sup> Further, because any profits realized from assignments of subleases would be retained by the assigning or subleasing lessee, the State would not have realized any of those funds in any event. Thus, an inflammatory statement that the State was swindled out of large sums of money is based on two assumptions and an incorrect understanding of the law – a troubling reality for an academic publication.

### **A. Huey P. Long**

Huey P. Long served as the fortieth governor of Louisiana, from 1928 to 1932. He was elected to the United States Senate and served in that capacity until his assassination in 1935.<sup>29</sup> Long rose from relative obscurity in Winn Parish to notoriety as the self-titled “Kingfish” of Louisiana. Numerous biographies and innumerable articles detail the life and political career of Huey Long,<sup>30</sup> making a comprehensive review here redundant. His political career began with his election to the Louisiana Railroad Commission in 1918 on a populist platform that he would

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<sup>28</sup> The assumed events are that the State would have otherwise attempted to and successfully would have leased these same areas to someone other than the Win or Lose interests and that such leases would have garnered more from the State than did the Win or Lose leases. The statistical analyses, *infra*, do not support the latter hypothetical assumption.

<sup>29</sup> White, *supra*, at ix-xii.

<sup>30</sup> See e.g., James Bolner, *LOUISIANA POLITICS: FESTIVAL IN A LABYRINTH* (LSU Press 1982); Henry C. Dethloff, *The Longs: Revolution or Populist Retrenchment?*, 19(4) *LOUISIANA HISTORY* 401 (1978); James Joseph Alcée Fortier, *HUEY PIERCE LONG, THE MARTYR OF THE AGE* (T.J. Moran’s Sons 1937); Hugh Davis Graham, *HUEY LONG* (Prentice-Hall 1970); Edward F. Haas, *Huey Pierce Long and Historical Speculation*, 27(2) *THE HISTORY TEACHER* 125 (1994); Hair, *supra*; Thomas O. Harris, *THE KINGFISH: HUEY P. LONG, DICTATOR* (Pelican Publishing Co. 1938); Elmer L. Irey & William J. Slocum, *THE TAX DODGERS: THE INSIDE STORY OF THE T-MEN’S WAR WITH AMERICA’S POLITICAL AND UNDERWORLD HOODLUMS* (Greenberg 1948); Glen Jeansonne, *Huey P. Long: A Political Contradiction*, 31(4) *Louisiana History* 373 (1990); Glen Jeansonne, *Huey P. Long, Gerald L. K. Smith and Leander H. Perez as Charismatic Leaders*, 35(1) *LOUISIANA HISTORY* 5 (1994); Glen Jeansonne, *HUEY AT 100: CENTENNIAL ESSAYS ON HUEY P. LONG* (McGinty 1995); Harnett T. Kane, *HUEY LONG’S LOUISIANA HAYRIDE: THE AMERICAN REHEARSAL FOR DICTATORSHIP 1928-1940* (Pelican Publishing Co. 1971); Reinhard H. Luthin, *AMERICAN DEMAGOGUES: TWENTIETH CENTURY* (Beacon 1954); Robert Mann, *LEGACY TO POWER: SENATOR RUSSELL LONG OF LOUISIANA* (Paragon House 1992); Allan P. Sindler, *HUEY LONG’S LOUISIANA: STATE POLITICS, 1920-1952* (Johns Hopkins 1956); Webster Smith, *THE KINGFISH: A BIOGRAPHY OF HUEY LONG* (G.P. Putnam Son’s 1933); Courtney Vaughn, *The Legacy of Huey Long*, 20(1) *LOUISIANA HISTORY* 93 (1979); T. Harry Williams, *HUEY LONG* (Knopf 1969); T. Harry Williams, *The Gentleman from Louisiana: Demagogue or Democrat*, 26(1) *THE JOURNAL OF SOUTHERN HISTORY* 3 (1960); White, *supra*.

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never fully step away from.<sup>31</sup> Long ran for governor in 1924 but lost.<sup>32</sup> Undeterred, he ran again in 1928 and won.<sup>33</sup> Once in office, Long quickly consolidated his political power by means of nepotism, legal maneuvering, and outright bullying.<sup>34</sup> Historians continue debate over Long's motivations, but less in debate is the means by which he accomplished his goals. A common theme in historical circles is that, under Long's political control, Louisiana no longer resembled a democracy; instead, all matters of the State were vested in one individual and were dependent upon his whims and moods.<sup>35</sup>

Long's control of Louisiana was near absolute,<sup>36</sup> and the men who were the founders of the Win or Lose venture were in his closest circle.<sup>37</sup> Thus, although not a founder of Win or Lose, Long clearly knew the details of the company's formation, methods, and purposes. It is important to note that Long was neither a founder nor an original shareholder of Win or Lose Corporation.<sup>38</sup> In fact, despite the interest that Long held in the company, his name does not show up on the Win or Lose paperwork until after his death in 1935.<sup>39</sup>

### **B. Oscar K. Allen**

At the time during which the Win or Lose Corporation was founded, the State of Louisiana was under a "Long dictatorship."<sup>40</sup> Although by 1934, Huey P. Long was a United States Senator, he continued to exercise substantial power in Baton Rouge.<sup>41</sup> It is now widely

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<sup>31</sup> Hair, *supra*, at 232. The Louisiana Railroad Commission is now known as the Louisiana Public Service Commission.

<sup>32</sup> White, *supra*, at 18.

<sup>33</sup> *Id.* at 35.

<sup>34</sup> *Id.* at 39 and 45.

<sup>35</sup> *Id.* at 125.

<sup>36</sup> For details, see Hair, *supra*, at 276-297.

<sup>37</sup> James Noe, Seymour Weiss, and Earle Christenberry.

<sup>38</sup> See Win or Lose Corporation Charter.

<sup>39</sup> See Michael Gillette Interview of Earle J. Christenberry, Jack B. McGuire Collection, Manuscript Collections 271, Series 4, Box 1, Folder 34 in the Louisiana Research Collection of the Howard-Tilton Memorial Library, Tulane University.

<sup>40</sup> Hair, *supra*, at 279.

<sup>41</sup> Long's only term as governor ended on January 25, 1932.

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accepted that Long had largely installed Oscar K. Allen as the then-current governor knowing that he could control Allen and thereby maintain his position as a Senator and his political influence over the Governor.<sup>42</sup>

Oscar K. Allen was governor of Louisiana from 1932 to 1936, following Huey Long's term. Allen was a boyhood friend of Long, and Long appointed him as the head of the Highway Commission early in Long's gubernatorial term.<sup>43</sup> Long later hand-picked Allen to run for governor after him.<sup>44</sup> As noted by both White and Williams, Allen's only qualification for governor consisted of his obedience to Huey Long.<sup>45</sup> Commenting on Allen's willingness to do Huey Long's bidding, Earl K. Long reportedly said of Allen that, "[a] leaf blew in the window of Allen's office and fell on his desk. He signed it," thinking that it was something from Huey needing approval.<sup>46</sup> Allen was elected to the United States Senate after Long's death, but suffered a brain hemorrhage and died in the governor's mansion on January 25, 1936.<sup>47</sup>

### **C. James A. Noe**

James A. Noe, though raised in Indiana, moved to Monroe, Louisiana, and established himself there as a prominent oilman, politician, and one of the primary financial backers of Huey Long. Noe was also one of the primary shareholders in and founders of the Win or Lose Corporation.

Noe was working as a drilling supervisor when he met Long, who was an attorney representing an injured worker.<sup>48</sup> The two instantly connected, bonding over a similar background and upbringing. In 1932 Long persuaded Noe to run for State senator. After he

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<sup>42</sup> White, *supra*, at 135.

<sup>43</sup> *Id.* at 41 and 102.

<sup>44</sup> *Id.* at 136.

<sup>45</sup> See generally White, *supra*; Williams, *supra*.

<sup>46</sup> Hair, *supra*, at 240.

<sup>47</sup> White, *supra*, at 304.

<sup>48</sup> McManus, *supra*, at 10.



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won, Noe was immediately appointed President Pro Tempore of the Senate.<sup>49</sup> In 1934, Noe was appointed Lieutenant Governor of Louisiana at Long's request.<sup>50</sup>

Long's death hit Noe particularly hard. Noe himself provided a transfusion of blood to his fallen friend, but despite his best efforts, Long died on September 10, 1935.

Without their charismatic leader, the Long political machine fractured. Two main factions arose from the group formed by Huey Long: one representing the old machine and old politics, the other adhering to Long's political vision, guided by the principles of his Share-The-Wealth program.<sup>51</sup> The former was led by a triumvirate composed of Seymour Weiss, Abe Shushan, and Robert Maestri; the latter by James Noe, Earle Christenberry, and Gerald K. Smith.<sup>52</sup> Unfortunately for Noe, he was outmaneuvered on several fronts and lost his gubernatorial election bid in 1936.<sup>53</sup>

It was somehow ironic, then, when Governor Allen suffered a brain hemorrhage and Noe, then Lieutenant Governor, became Governor, albeit only for a fourteen-week lame duck governorship. During his brief tenure as Governor, Noe made several shrewd political decisions that would help him later in his career but otherwise did nothing politically of note. It was during this brief time, however, that Noe granted several mineral leases to William T. Burton that are the subject of this report.

Noe again reemerged as a prime candidate in the 1940 governor's election.<sup>54</sup> The other two candidates of note were Earl K. Long and Sam Jones.<sup>55</sup> Jones was an attorney from the Lake

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<sup>49</sup> *Id.* at 11.

<sup>50</sup> *Id.* at 12.

<sup>51</sup> Allan P. Sindler, *HUEY LONG'S LOUISIANA*, 118 (John Hopkins University Press 1956).

<sup>52</sup> *Id.*

<sup>53</sup> McManus, *supra*, at 43.

<sup>54</sup> *Id.* at 66.

<sup>55</sup> *Id.*

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Charles area who ran on a clean government and anti-Long platform.<sup>56</sup> Noe struck a deal with Jones, removed himself from the fight for governor, and threw his support behind Jones.<sup>57</sup> Jones won the race, and for his support James Noe was able to fill several key governmental positions with men loyal to him.<sup>58</sup> Although Noe attempted to break back into politics on a few more occasions, the remainder of his life was largely focused on his business interests, which included the oil and gas assets (some of which derived from his association with Win or Lose) and media assets. Noe ultimately died in 1976.

### **D. William T. Burton**

William Thomas Burton, more commonly referred to as W.T. Burton, was a self-made businessman, who started with a grocery store in Sulphur, Louisiana, and became one of the most successful industrialists and philanthropists of Calcasieu Parish.<sup>59</sup> He was chairman of the Calcasieu Marine National Bank and president of William T. Burton Industries of Sulphur, a company focused on oil and mineral investments.<sup>60</sup> For the purposes of this report, Burton was also involved with the Win or Lose Corporation by leasing land from the State for mineral exploration and production and then assigning<sup>61</sup> substantial interests in those leases to the Win or Lose Corporation.<sup>62</sup> It is important to note that, based upon the documents available at this time,

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<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 75.

<sup>58</sup> *Id.* at 77.

<sup>59</sup> Erbon W. Wise, BRIMSTONE!: THE HISTORY OF SULPHUR, LOUISIANA, 1878-1980, 107 (Southwest Builder News 1981).

<sup>60</sup> Kathie Bordelon, MCNEESE STATE UNIVERSITY, 18 (Arcadia 2001).

<sup>61</sup> An "assignment" in this context is defined as, "a transfer of rights in real or personal property or rights under a contract – for example, the transfer of an oil and gas lease from the original lessee to others." Susan Toalson, A DICTIONARY FOR THE OIL AND GAS INDUSTRY (1<sup>st</sup> ed.), 13 (Univ. of Texas at Austin 2005). *See also* Howard R. Williams & Charles J. Meyers, MANUAL OF OIL AND GAS TERMS (4<sup>th</sup> ed.), 30 (Matthew Bender 1976).

<sup>62</sup> It is important to note that, contrary to some media allegations suggesting that Burton was new to mineral leasing at the time of the Win or Lose Corporation activities that are the subject of this report, mineral activities were merely another part of Burton's industrial pursuits, and his activities in this area long predated the Win or Lose Corporation. In fact, Burton first acquired a mineral lease from the State in 1920 (State Lease 42) – some 14 years before the Win or Lose Corporation was even formed. When asked this question during the *U.S. v. Noe* trial in 1942, Burton noted that he had been in the oil business "...ever since – the Spindle top [sic]...maybe thirty-five years or better."

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it does not appear, nor has any new evidence been identified to suggest, that Burton, himself, was a stockholder in the Win or Lose Corporation.<sup>63</sup>

Few if any of the major political biographies or monographs related to Louisiana mention Burton; he seems to have kept a low profile, never running for political office or seemingly otherwise directly involved in Louisiana politics. Although Burton was on the receiving end of two Internal Revenue Service tax evasion trials and an additional trial for jury tampering (the latter of which garnered him a two-year stint in the penitentiary),<sup>64</sup> he is fondly remembered in his home parish. Indeed, several buildings at McNeese State University are named in his honor: The Burton Business Center and the Burton Coliseum, built on land that he donated to the University.<sup>65</sup> Additionally, the William T. Burton and Ethel Lewis Burton Foundation award Lake Charles area high schools with scholarships for outstanding graduating students.<sup>66</sup> W.T. Burton died in 1974.

### **E. Earle Christenberry**

Earle Christenberry was Huey Long's private secretary, an influential man behind the scenes of the Long administration and the subsequent Longite administrations. In a letter to J. Edgar Hoover, FBI Special Agent Sackett describes Christenberry as, "a very good student of Politics...a level-headed, capable young man."<sup>67</sup> Because Christenberry largely operated in the background of other prominent individuals, little biographical information is available. He was

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Testimony of William T. Burton, Trial Transcript at 186, *United States v. Noe*, Docket No. 20,070 (E.D. La.). It is also important to note that Burton did not always prevail when he was a bidder on State mineral leases. In fact, one example of such an unsuccessful bid occurred during the Noe administration, where Burton was outbid by Shell on a lease at the same lease sale as State Lease 340. Anon., *Shell High Bidder on State Lease*, OIL NEWS OF THE SOUTHWEST (Feb. 20, 1936).

<sup>63</sup> See Original Articles of Incorporation.

<sup>64</sup> Anon., *19-Year-Old Tax Dispute Settled, William T. Burton to Pay U.S. \$635,000*, THE TIMES PICAYUNE 1 (Nov. 16, 1954).

<sup>65</sup> Bordelon, *supra*, at 19.

<sup>66</sup> Wise, *supra*, at 107.

<sup>67</sup> Letter from Special Agent Sackett to J. Edgar Hoover, dated May 22, 1939.

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born in New Orleans and grew up in a working class family.<sup>68</sup> His brother, Herbert W. Christenberry, was a judge in the federal court for the Eastern District of Louisiana from 1949 to 1967.<sup>69</sup>

Earle Christenberry, along with Gerald K. Smith and James A. Noe, constituted one major faction of the Longites while Seymour Weiss, Robert Maestri, and others constituted the second major faction.<sup>70</sup> Christenberry faded from public view not long after Long's death. Nonetheless, Earle Christenberry lived until 1980.

### **F. Seymour Weiss**

Seymour Weiss was a prominent New Orleans businessman, manager turned owner of the fabled Roosevelt Hotel, and one of Huey Long's closest confidants.<sup>71</sup> Weiss was the treasurer for Huey Long's campaign and was active behind the scenes of the Long administration.<sup>72</sup> In 1929, the House of Representatives summoned Weiss to give testimony regarding certain expenditures the anti-Long faction believed had been used by Huey Long for drinking and girls; Weiss, in a spectacular display of loyalty to Long, refused to answer any questions regarding the money.<sup>73</sup> Weiss remained Huey's steadfast friend and business partner, sharing in the successes of the Win or Lose venture. Weiss was one of those at Long's bedside when the latter died. Weiss died in 1969.

### **III. Historic Controversies**

The Win or Lose Corporation and the involvement of its officers or shareholders in various mineral leases from the State of Louisiana have been controversial virtually since the

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<sup>68</sup> Federal Judicial Center Web site, [http://www.fjc.gov/history/home.nsfpage/tu\\_bush\\_bio\\_christenberry.html](http://www.fjc.gov/history/home.nsfpage/tu_bush_bio_christenberry.html) (last accessed Jul. 3, 2013).

<sup>69</sup> *Id.*

<sup>70</sup> Sindler, *supra*, at 118.

<sup>71</sup> White, *supra*, at 80.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 81

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corporation’s inception. This section reviews both the legal disputes related to these matters as well as the treatment of these issues by the media (excepting the most recent media review discussed above).

**A. Review of all known legal cases filed, their outcomes, and their impact on any current or future action.**

According to the multitude of materials reviewed by LDOJ during this inquiry into the Win or Lose Corporation, a total of seven (7) lawsuits were identified as having been filed related to one or more of the matters surrounding the Win or Lose Corporation. These cases, all reviewed herein, are set forth in Table 2.

**Table 2. List of lawsuits filed on matters related to the Win or Lose Corporation’s mineral leasing activities with the State of Louisiana**

<b>Caption</b>	<b>Docket No.</b>	<b>Court</b>	<b>Filing Date</b>	<b>Plaintiffs</b>	<b>Defendants</b>
<i>State v. Noe</i>	11,112	19 <sup>th</sup> JDC	3/27/1936	State ex rel. Land Investment Company, Inc.	James A. Noe, The Texas Co., William T. Burton
<i>State v. Noe</i>	11,126	19 <sup>th</sup> JDC	4/2/1936	State ex rel. C.M. Brenner	James A. Noe and William T. Burton
<i>U.S.A. v. Noe</i>	20,070	E.D. La.	10/8/1940	United States	James A. Noe, Seymour Weiss, and Win or Lose Corp.
<i>State v. Burton</i>	22,664	14 <sup>th</sup> JDC	10/5/1943	State ex rel. State Mineral Board	William T. Burton, Sam H. Jones
<i>State v. Grace</i>	21,076	19 <sup>th</sup> JDC	2/4/1944	State, State Mineral Board	Lucille May Grace, Independent Oil and Gas Co., Inc., J.E. Farrell, M.S. Rhoads, D.J. Simmons, Fazel Gas, Inc., Union

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					Producing Co., Interstate Natural Gas Co.
<i>Daspit v. State</i>	23,833	19 <sup>th</sup> JDC	12/7/1945	Justin C. Daspit; and J.N. Marcantel	State Mineral Board
<i>Roussel v. Noe</i>	42,338; 8939	16 <sup>th</sup> JDC; 1 <sup>st</sup> Cir.	7/27/1971; 5/22/1972	Louis J. Roussel	James A. Noe, State Mineral Board

**1. *State v. Noe*, Docket No. 11,112, Nineteenth Judicial District Court**

In this case, a writ of mandamus was brought seeking an order directing then-Governor James A. Noe to cancel State Lease 335, which was issued by Governor Oscar K. Allen to W.T. Burton on January 23, 1936.<sup>74</sup> This suit was brought by the Land Investment Company, Inc., on March 27, 1936, and alleged that former Governor Allen unlawfully ignored its nomination of certain acreage to be advertised for bidding.<sup>75</sup> This same acreage was later nominated by W.T. Burton. In its Petition, the State acknowledged that Governor Allen advertised the nomination for bidding; and that Burton submitted the winning bid.<sup>76</sup> The nominated area became State Lease 335. Land Investment Company, Inc., alleged that it was injured by Governor Allen’s failure to advertise the acreage for bidding upon its application for same because, by the time W.T. Burton nominated the same area, the nomination was for such a large swath of land that Land Investment Company, Inc., was financially unable to bid on the nomination.<sup>77</sup> Following the filing of this litigation, some minimal activity occurred in the court record (*e.g.*, the filing of exceptions and answers). This case was settled on May 28, 1936, and a judgment was entered on

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<sup>74</sup> The relevant court documents are attached hereto as Appendix 12.

<sup>75</sup> Petition at ¶ 4. *State v. Noe*, Docket No. 11,112, 19<sup>th</sup> JDC.

<sup>76</sup> *Id.* at ¶ 7.

<sup>77</sup> *Id.* at ¶ 9.

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June 1, 1936, approving the compromise.<sup>78</sup> No copy of the settlement exists in the court record or in the State lease record.

This case does not have a *res judicata* effect on any theory that the State might use today to challenge this lease. However, it is important to note that a review of the law in force at the time State Lease 335 was issued (*i.e.*, the review undertaken *in extenso* in this report) reveals that, had this matter gone to trial on the mandamus issue, it would have failed. The mandamus relief sought in this matter assumes that Governor Allen was legally obligated to advertise any nomination of State property for mineral leasing. If this were the case, as a mandatory and ministerial (*i.e.*, nondiscretionary) act, Allen was required to advertise the acreage nominated by Land Investment Company, Inc., upon its application on July 3, 1935. Following this argument to its end, Allen's failure to advertise Land Investment Company, Inc.'s nomination allowed W.T. Burton to later nominate the same property (albeit as part of a much larger nomination), bid on it, and receive the State lease for the property. However, the law in force at the time of this activity, Acts 1915, No. 30,<sup>79</sup> specifically makes the advertisement for bidding of any nominated property discretionary for the governor.<sup>80</sup> The discretionary authority of an elected official cannot be compelled by way of mandamus.<sup>81</sup> Thus, the plaintiff's action in this matter would have failed on the grounds that Governor Noe had no obligation to cancel a lease for Governor Allen's failure to exercise his discretion to advertise Land Investment Company, Inc.'s nomination for what became State Lease 335.

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<sup>78</sup> Judgment at ¶ 2

<sup>79</sup> As amended by Acts 1926, No. 315 and Acts 1928, No. 9 (Extra Session).

<sup>80</sup> This reality is so because of the "may" language in the following excerpt:

... the Governor of the State **may** cause the Register of the State Land Office to make an inspection of the land sought to be leased and ... the Governor **may** cause to be published in the official journal of the State ... a description of the land to be leased by the State...

Acts 1915, No. 30, Sec. 3 (in pertinent part; emphasis added).

<sup>81</sup> *Badger v. City of New Orleans*, 21 So. 870, 872 (La. 1897) ("The mandamus issues only to enforce the purely ministerial duty imposed by law."); see also *Cook v. City of Shreveport*, 112 So. 402 (La. 1927); *State ex rel. City of New Orleans v. Louisiana Highway Commission*, 156 So. 806 (La. 1934).

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For this reason, while this case is instructive of the current question of whether the governors of the 1930s had the discretion to reject (or not act on) certain nominations, it is not an indictment of the letting of State Lease 335. Because of Governor Allen's statutory authority at the time, he was authorized to reject nominations and could not be compelled to advertise each nomination for bid.

### **2. *State v. Noe*, Docket No. 11,126, Nineteenth Judicial District Court**

This case was another mandamus proceeding against then-Governor James A. Noe by a losing bidder for State Lease 321.<sup>82</sup> State Lease 321 was granted on January 23, 1936, by then-Governor Oscar K. Allen to W.T. Burton. The problem alleged in this action was that, apparently when the original lease was issued, it was not properly advertised.<sup>83</sup> Although the lease was advertised in other parishes, it was not advertised in the official journal of the parish in which the land was situated (in this case, Caddo Parish).<sup>84</sup> For this reason, the lease, subsequent to its issuance, was readvertised (this time properly). The complaining party in this case, C.M. Brenner, alleged that his bid, submitted pursuant to the advertised lease term – one (1) year – was more advantageous to the State than Burton's bid for a two (2) year term.<sup>85</sup> Brenner further alleged that because the advertisement sought a bid for a one (1) year term and Burton's bid was for a two (2) year term, not only was his bid more advantageous to the State, but that he (Brenner) had submitted the only bid in conformity with the advertisement and that the lease should have been awarded to him.<sup>86</sup>

This matter reached the Louisiana Supreme Court in the case entitled *State ex rel. Brenner v. Noe*, 171 So. 708, 712 (La. 1936); nevertheless, the Court did not rule on the merits as

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<sup>82</sup> The relevant court documents are attached hereto as Appendix 13.

<sup>83</sup> Petition at ¶ 3, *State v. Noe*, Docket No. 11,126, 19<sup>th</sup> JDC.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at ¶ 9.

<sup>86</sup> *Id.* at ¶¶ 11, 12.



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to the acceptance of a two year lease when the actual advertisement called for only one year. Thus, this question remains unresolved as to this lease. However, State Lease 321 is no longer active, hence making any further inquiry into the validity of the lease moot. Further, as the Louisiana Supreme Court has noted in other matters,

[a]s the obligations of the lessee have been fully complied with under the terms of the lease, the lease has become an executed contract. The State has accepted the benefits of the lease for several years in receiving the sum of \$500, paid by the lessee as bonus and rentals, and neither law, equity nor good conscience will allow the State to claim the benefits and at the same time escape its obligations under the lease.<sup>87</sup>

In other words, because the State accepted the benefits of this lease during its existence, the Louisiana Supreme Court has held that the State cannot later challenge the same lease for irregularities in the advertisements for the lease. This is an important problem for any current challenges to any Win or Lose leases, as the State has undoubtedly accepted the benefits (*i.e.*, royalties, etc.) from all of the Win or Lose leases over time. Accordingly, the passage of time and the acceptance of the benefits of the lease have now effectively barred the State from challenging this lease based on the advertised lease term issue.

### **3. *United States of America v. Noe*, Docket No. 20,070, Eastern District of Louisiana**

This case was a federal income tax evasion matter brought by the United States against James A. Noe, Seymour Weiss, and the Win or Lose Corporation, in which the federal government alleged that the named defendants had concealed certain income information in order to avoid the imposition of income taxes, thus violating and conspiring to violate the Internal Revenue Code.<sup>88</sup>

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<sup>87</sup> *Reeves v. Leche*, 195 So. 542, 545 (1940). See also *State ex rel. Shell Oil Company, Inc., v. Register of the State Land Office*, 192 So. 519 (La. 1939).

<sup>88</sup> Aside from the trial transcript, which is included elsewhere, the relevant court documents from this matter are attached hereto as Appendix 14. The trial transcript is attached hereto as Appendix 9.

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On October 3, 1940, an indictment of the defendants was returned, charging them with violations of the Internal Revenue Code, Sec. 145(b),<sup>89</sup> 26 U.S.C. § 1693(b)(1),<sup>90</sup> and 18 U.S.C. § 88.<sup>91</sup> Following the indictment, the United States filed a criminal case against the defendants on October 8, 1940, in the Eastern District of Louisiana, New Orleans Division, bearing the docket number 20,070. Defendant Weiss entered a guilty plea. The imposition of his sentence was suspended and Weiss was placed on probation for a period of five (5) years. Both Noe and the Win or Lose Corporation entered pleas of not guilty.

Noe was questioned regarding certain deposits and payments made to the Win or Lose Corporation. To most of these questions, Noe responded that he had no recollection of specific transactions.<sup>92</sup> He did specifically note that one payment to former Governor Allen was a gift

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<sup>89</sup> Section 145(b) of the Revenue Act of 1934, Section 145(b) of the Internal Revenue Code read, in pertinent part, as follows:

Any person required under this title to collect, account for, and pay over any tax imposed by this title, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

*See now* 26 U.S.C. §§ 7201 and 7202.

<sup>90</sup> Section 1114(c) of the Revenue Act of 1926, 26 U.S.C. § 1693(b)(1) read, in pertinent part, as follows:

Any person who willfully aids or assists in, or procures, counsels, or advises, the preparation or presentation under, or in connection with any matter arising under, the internal-revenue laws, of a false or fraudulent return, affidavit, claim, or document, shall (whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document) be guilty of a felony and, upon conviction thereof, be fined not more than \$10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

*See now* 26 U.S.C. § 7206(2).

<sup>91</sup> The former 18 U.S.C. § 88 provided:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both.

*United States v. Rigas*, 565 F. Supp. 2d 620, 636 (M.D. Pa. 2008), *aff'd in part, remanded in part*, 584 F.3d 594 (3d Cir. 2009) *on reh'g en banc*, 605 F.3d 194 (3<sup>rd</sup> Cir. 2010), and *aff'd in part, vacated in part, remanded*, 605 F.3d 194 (3<sup>rd</sup> Cir. 2010). *See now* 18 U.S.C. § 371.

<sup>92</sup> *United States v. Noe*, Docket No. 20,070 (E.D.La.). Sworn statement of James A. Noe given on November 4, 1937, at 3-5.

## **ATTORNEY-CLIENT PRIVILEGED COMMUNICATION**

rather than the payment of dividends<sup>93</sup> and that former Governor Long was never issued any shares of stock in Win or Lose Corporation.<sup>94</sup> Both statements are incorrect, as was borne out by the testimony of various individuals in the trial in 1942.

Nonetheless, on April 11, 1942, a jury returned not guilty verdicts against the defendants on all four counts of attempted tax evasion. Although this case is related to the Win or Lose Corporation, it provides no real legal insight into the matter being reviewed here, except to confirm certain facts, and it has no legal bearing on any claims that the State may have today.

#### **4. *State v. Burton*, Docket No. 22,664, Fourteenth Judicial District Court**

This case, filed on October 5, 1943, against W.T. Burton in Calcasieu Parish, challenged the validity of State Lease 318 and certain actions related to that lease subsequent to its issuance.<sup>95</sup> Specifically, the suit, filed by the State Mineral Board in the name of the State of Louisiana (the suit subsequently was amended to add the State Mineral Board as an actual coplaintiff), alleged that: (1) certain assignments to The Texas Company and the Win or Lose Corporation were invalid for the failure to record those assignments and because no consideration was paid for those assignments by Win or Lose Corporation;<sup>96</sup> (2) those assignments were further invalid because then-Governor Oscar K. Allen, as a stockholder of the Win or Lose Corporation, received a benefit from the assignments;<sup>97</sup> (3) the interests of The Texas Company and the Win or Lose Corporation were reassigned to Burton to avoid the necessity of paying delay rentals;<sup>98</sup> (4) State Lease 318, itself, was invalid because it did not

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<sup>93</sup> *Id.*, at 9.

<sup>94</sup> *Id.*, at 10-11. This same statement was made by Earle Christenberry some thirty years later in a private interview. See Michael Gillette Interview of Earle J. Christenberry, Jack B. McGuire Collection, Manuscript Collections 271, Series 4, Box 1, Folder 34 in the Louisiana Research Collection of the Howard-Tilton Memorial Library, Tulane University.

<sup>95</sup> The relevant court filings from this matter are attached hereto as Appendix 15.

<sup>96</sup> Petition at ¶ 8, *State v. Burton*, Docket No. 22,664, 14<sup>th</sup> JDC.

<sup>97</sup> *Id.* at ¶ 12.

<sup>98</sup> *Id.* at ¶ 15.

## **ATTORNEY-CLIENT PRIVILEGED COMMUNICATION**

contain a “reasonable development clause” and it contains unusual, disadvantageous, and unfair terms to the State, thus meaning that Burton’s bid should have been rejected;<sup>99</sup> (5) State Lease 318 had (at that time) kept State land out of commerce for 8 years (with an indefinite term) and it was illegal, null and void, and violative of the doctrine of ownership;<sup>100</sup> (6) the consideration of less than seven (7) cents per acre and the yearly rental of less than four (4) cents per acre was inadequate, trifling, and constituted the legal equivalent of paying no consideration;<sup>101</sup> (7) State Lease 318 was procured through conspiracy, favoritism, collusion, and fraud;<sup>102</sup> (8) State Lease 318 was invalid because then-Governor Allen granted himself 1/226th overriding royalty;<sup>103</sup> and (9) State Lease 318 was one of several similar fraudulent transactions by W.T. Burton.<sup>104</sup>

Following six months of exceptions, amendments to the petition, and other legal maneuverings, the Court, on April 5, 1944, issued its reasons for judgment. By the time of judgment, which was not a judgment on the merits of the State’s or the State Mineral Board’s claims, the court was presented with two primary questions, to wit:

1. Does the State of Louisiana in an action in which it may have an interest as a distinct entity apart from other entities or corporate agencies it may create and in its own name and sovereign capacity have the legal right or capacity under our law to institute and maintain such action represented therein by and through some person or agency of the State other than the Attorney General as the legal representative of the State.
  
2. Does the State of Louisiana as plaintiff in this suit have any legal right or authority under our law to institute and maintain this suit in the name of the State Mineral Board, or by any supplemental pleadings implead or make the State Mineral Board a co-plaintiff in the suit, even though it be alleged in such supplemental and amended pleadings that the State Mineral Board through its special counsel consents to being made a party plaintiff with the State of Louisiana.<sup>105</sup>

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<sup>99</sup> *Id.* at ¶ 17.

<sup>100</sup> *Id.* at ¶ 19.

<sup>101</sup> *Id.* at ¶ 20.

<sup>102</sup> *Id.* at ¶ 20.

<sup>103</sup> *Id.* at ¶ 25.

<sup>104</sup> *Id.* at ¶ 27.

<sup>105</sup> Reasons for Judgment at 8, *State v. Burton*, Docket No. 22,664, 14<sup>th</sup> JDC.

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In issuing its judgment in favor of W.T. Burton on the two questions noted above, the Court held that:

Since, therefore, this Court has already concluded that the State of Louisiana as the plaintiff in the main or original suit is without right or cause of action to institute this suit brought by and represented therein by an individual or agency other than the Attorney General and must be dismissed, it naturally follows that this intervention, if it may be called such, must be dismissed, without prejudice, however, to the right of the State Mineral Board to asserts its rights in a separate action.<sup>106</sup>

In other words, the Court found that the State of Louisiana did not have the authority to institute this suit by an individual or agency other than the Attorney General and that the later joinder of the State Mineral Board as an additional party plaintiff did not correct that error.

The record of this case reflects that the State parties filed an appeal after losing. However, the appeal was jointly dismissed by the parties, stating that, “[i]n virtue that the Mineral Board has formally recognized the validity of Lease 318 and the differences between Plaintiff-Defendant have been compromised, this litigation has become moot.”<sup>107</sup>

The end result of this case is that there was no ruling on the merits by a court as to the validity of State Lease 318, the assignments of that lease to Win or Lose Corporation, or any of the other substantive matters of interest to the current review. It is further important to note that because this case was dismissed on procedural grounds only, it does not have a *res judicata* binding effect on the State as to the possible litigation of these matters today. However, because the State Mineral Board/State “recognized the validity of Lease 318,” it is reasonably likely that this apparent ratification undermines the ability of the State today to bring a challenge to this lease for leasing inconsistencies.<sup>108</sup> In addition, the State’s acceptance of the benefits of this

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<sup>106</sup> *Id.*, at 18.

<sup>107</sup> Joint Motion for Dismissal of Appeal of Plaintiffs-Appellants at II, Supreme Court of Louisiana, Docket No. 37,524.

<sup>108</sup> It should be noted that this lease no longer exists. The final release on State Lease 318 occurred in 1975.

## **ATTORNEY-CLIENT PRIVILEGED COMMUNICATION**

lease subsequent to this settlement would, under *State ex rel. Shell Oil Co., Inc. v. Register of State Land Office*,<sup>109</sup> undermine the State's ability to now challenge the lease or the settlement.

### **5. *State v. Grace*, Docket No. 21,076, Nineteenth Judicial District Court**

In this case, filed on February 4, 1944, the State and the State Mineral Board brought an action against the Register of State Lands, Lucille May Grace, as well as against Independent Oil & Gas Corporation, Morris S. Rhoads, John A. Farrell, and D.J. Simmons, seeking a declaration that State Lease 309 was invalid.<sup>110</sup> State Lease 309 was granted to James A. Noe on October 23, 1934, during the gubernatorial term of Oscar K. Allen (and prior to Allen's death). The basis of the original claim was the allegation that, because no cash bonus was paid to the State for State Lease 309, the real consideration for the lease was the lessee's obligation to drill 50 wells within the primary term.<sup>111</sup> According to the Petition, after the completion of only four (4) wells, on August 21, 1935, the Register of the State Land Office cancelled and changed the terms of the lease to require only 30 wells, instead of 50.<sup>112</sup> The State in this matter alleged that such a change constituted the Register acting beyond her authority to the prejudice of the State.<sup>113</sup>

On July 6, 1944, the State amended its petition, alleging that State Leases 494 and 495, which also covered areas within State Lease 309, were invalid because they were issued pursuant to Acts 1940, No. 47, which had been declared unconstitutional.<sup>114</sup> Following this action, there was some discovery undertaken and answers filed. In April of 1945, both the State Mineral Board and the board of Independent Oil & Gas Co., Inc., passed resolutions authorizing a settlement of this litigation.

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<sup>109</sup> 192 So. 519 (La. 1939).

<sup>110</sup> The relevant filings in this matter are attached hereto as Appendix 16.

<sup>111</sup> Petition, *State v. Grace*, Docket No. 21,076, 19<sup>th</sup> JDC at ¶ 11.

<sup>112</sup> *Id.* at ¶ 14.

<sup>113</sup> *Id.* at ¶ 15.

<sup>114</sup> Second Amended Petition at ¶ 2.

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On May 2, 1945, the parties executed an agreement to settle and compromise the lawsuit, with the private defendants paying the State the sum of \$10,000.00 as well as surrendering and releasing the property described in State Lease 309.<sup>115</sup> In exchange, the State agreed to ratify State Lease 309, as amended by the Register on August 21, 1935, and to dismiss its claims.<sup>116</sup> On May 11, 1945, the court entered a judgment dismissing the matter pursuant to the settlement among the parties.<sup>117</sup> Accordingly, pursuant to this settlement and judgment: (1) State Lease 309 was recognized as a valid mineral lease between the State of Louisiana and (then) Independent Oil & Gas Co., Farrell, Rhoads, and Simmons; (2) the demands against Interstate Natural Gas Company and United Gas Public Service Company were rejected and dismissed; and (3) the State received a judgment in its favor in the amount of \$10,000.00.<sup>118</sup>

The practical impact of this case is likely significant for the current inquiry. This settlement and judgment on matters related to the validity of State Leases 309, 494, and 495 most likely creates a situation where the validity and viability of these leases, once called into question by the State and the State Mineral Board, were settled and the judgment entered by the court now has a *res judicata* effect on the State's ability to challenge these leases.<sup>119</sup> For this reason, this inquiry considers no further the involvement of James A. Noe, Win or Lose Corporation, or Independent Oil and Gas Company, Inc., as to State Leases 309, 494, and 495. Pursuant to the

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<sup>115</sup> Settlement Agreement at ¶ 6(a)(b).

<sup>116</sup> *Id.* at ¶ 6(d).

<sup>117</sup> Judgment rendered on May 11, 1945 at 1.

<sup>118</sup> *Id.* at 2.

<sup>119</sup> It is not possible to foreclose the ability of the State to raise today matters somewhat related (though not the same) as the issues settled in this case. Such a situation would be dependent upon the similarity of the claims today and the claims in the 1944 litigation. The basic precepts underlying this qualification are the requirements of the exception of *res judicata*. As Maraist and Lemmon have noted, "*res judicata* is applicable to 'all causes of action existing at the time of final judgment arising out of the transaction or occurrence that is the subject matter of the litigation.'" 1 LA. CIV. L. TREATISE, *Civil Procedure* § 6:7 (2d ed.). Thus, under La. C.C.P. Art. 927(A)(3), in order for *res judicata* to apply to a matter, the claims must arise out of the same "transaction or occurrence" that was the subject of the original case. It is difficult to conceive of a scenario in which the State would be able to assert claims not originally raised or able to be raised in the original suit, thus making a viable cause of action as to these leases after the 1944 litigation unlikely.

## **ATTORNEY-CLIENT PRIVILEGED COMMUNICATION**

settlement and judgment, the State ratified the complained-of activities and was compensated for perceived losses.<sup>120</sup> Effectively, the State has been made whole with regard to these leases even if there was never a finding of wrongdoing by the court (which there was not).

### **6. *Daspit v. State*, Docket No. 23,833, Nineteenth Judicial District Court.**

On December 7, 1945, counsel for the State in the *State v. Burton* and *State v. Grace* matters noted above filed this suit against the State Mineral Board in East Baton Rouge Parish for the payment of their attorneys' fees stemming from the original cases cited above.<sup>121</sup> Although the petition and the answer in this matter mention issues related to the *State v. Burton* and *State v. Grace* suits,<sup>122</sup> this case does not contain any new information and it is not particularly relevant to understanding the broader issues of the history of the Win or Lose Corporation's activities under review here. This case focuses on the authority of the State Mineral Board to retain counsel and whether such counsel was properly compensated. Nonetheless, this case lasted for nearly nine years, with a judgment in 1954 in the Plaintiffs' favor.<sup>123</sup>

### **7. *Roussel v. Noe*, Docket No. 42,338, Sixteenth Judicial District Court; Docket No. 8939, First Circuit Court of Appeal**

On July 27, 1971, Louis J. Roussel, Jr., filed a class action suit in St. Mary Parish against two defendants: former Governor James A. Noe, individually, and the State Mineral Board of the State of Louisiana.<sup>124</sup> Roussel alleged that Noe conspired to utilize his position of trust to obtain

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<sup>120</sup> A very rough calculation of the inflationary value of this \$10,000.00 figure from 1945 in 2013 dollars is \$129,724.44. The current dollar calculations were made using the CPI Inflation Calculator, available online at <http://data.bls.gov/cgi-bin/cpicalc.pl>.

<sup>121</sup> The relevant filings from this matter are attached hereto as Appendix 17.

<sup>122</sup> Petition at ¶¶ 15, 16, 17 and Answer at ¶¶ 15, 16, 17, *Daspit v. State*, Docket No. 23,833, 19<sup>th</sup> JDC; and Petition at ¶¶ 23 and 28, *State v. Grace*, Docket No. 21,076, 19<sup>th</sup> JDC.

<sup>123</sup> Judgment rendered on 11/2/54, *Daspit v. State*, Docket No. 23,833, 19<sup>th</sup> JDC.

<sup>124</sup> Petition at ¶ 55, *Roussel v. Noe*, Docket No. 42,338, 16<sup>th</sup> JDC. The putative class members were all Louisiana taxpayers. The relevant court filings from the district court are attached hereto as Appendix 18.



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mineral interests in State properties, namely State Leases 340 and 341.<sup>125</sup> According to Roussel, the conspiracy was confected through the creation of the Win or Lose Corporation.<sup>126</sup> Although, by the time of Roussel's suit in the 1970s, the Win or Lose Corporation, which later changed its name to Independent Oil & Gas Company, Inc., had been liquidated, Roussel alleged that many of the individual stockholders that gained an interest upon liquidation benefitted from Noe's actions in the awarding of certain State leases and assignments.<sup>127</sup> Roussel sought to have the leases declared null and void and to require an accounting and reimbursement to the State.<sup>128</sup>

In this suit, Roussel brought his action based upon his alleged standing as a taxpayer in Louisiana.<sup>129</sup> On August 26, 1971, the district court ruled that Roussel, as a taxpayer, had no standing to bring such an action and that the Attorney General was the only party empowered to bring such a suit.<sup>130</sup> The court further ruled that, because Roussel's suit would necessarily impact the rights of those that had acquired interests in the subject leases by way of assignment, all of the assignees of the challenged leases were necessary parties to the litigation.<sup>131</sup> These rulings led to a dismissal of Roussel's suit by the district court on August 31, 1971.<sup>132</sup>

Following the district court's dismissal of Roussel's suit on exceptions, Roussel sought an appeal to the First Circuit Court of Appeal.<sup>133</sup> In the matter entitled, *Roussel v. Noe*, 274 So.2d 205 (La. App. 1 Cir. 1973), *writ refused*, 281 So.2d 743 (La. 1973), the First Circuit held that the district court was correct in rejecting the class action nature of Roussel's suit. However,

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<sup>125</sup> *Id.* at ¶ 3.

<sup>126</sup> *Id.* at ¶¶ 32, 46.

<sup>127</sup> *Id.* at ¶¶ 42, 43.

<sup>128</sup> *Id.* at ¶ 55.

<sup>129</sup> *Id.* at ¶ 1.

<sup>130</sup> Reasons for Rulings on Exceptions at 2.

<sup>131</sup> *Id.* at 3.

<sup>132</sup> Judgment at 1.

<sup>133</sup> The decision from the First Circuit is available in the Southern Reporter (2d). However, the relevant filings with the First Circuit in this matter are attached hereto as Appendix 19.

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the court did find that Roussel was “entitled to proceed as an individual taxpayer.”<sup>134</sup> The court further stated that, “the Attorney General may intervene [in Roussel’s suit] if he so desires and assert ... whatever position his judgment dictates is the proper one for the State of Louisiana.”<sup>135</sup> This judgment effectively revived Roussel’s suit, with some limitations.

The First Circuit went on to note that the State Mineral Board had been improperly joined in the suit against Noe. The reason for this ruling was that the action against the State Mineral Board, which, like several of the cases discussed *supra*, was a mandamus action seeking the cancellation of the challenged leases, which is a summary proceeding that could not be cumulated with the ordinary proceeding against Noe. Noting that “[m]andamus does not lie to compel the performance of a discretionary act,”<sup>136</sup> the First Circuit effectively severed the State Mineral Board as a defendant (and upheld its dismissal in the district court) in the continued prosecution of Roussel’s case, as,

[t]he State Mineral Board cannot be said to have failed to perform its ministerial duty until such time as plaintiff has successfully invalidated Noe’s and others’ interests in and to the royalties emanating from the subject leases.<sup>137</sup>

As yet, Roussel had not proven that any of the challenged leases had been improperly granted. Thus, no mandatory duty on the part of the State Mineral Board to cancel the leases could exist for which a mandamus action could attach. Further, even if there was such a duty found later, such an action could not be brought as part of an ordinary proceeding, as mandamus actions employ a separate procedure.<sup>138</sup> Thus, any such demand would have to be brought later as a separate lawsuit.

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<sup>134</sup> 274 So.2d at 209.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 213.

<sup>137</sup> *Id.*

<sup>138</sup> 1 LA. CIV. L. TREATISE §5.3.

## **ATTORNEY-CLIENT PRIVILEGED COMMUNICATION**

Finally, the First Circuit held that the district court's holding that those possessing interests in the leases by way of assignment must be joined as parties to the lawsuit was correct.<sup>139</sup> Thus, in order to continue this action, Roussel was required to add as parties defendant numerous other interest holders in the leases.

On remand, Roussel continued the prosecution of his case. To begin, Roussel amended his petition on September 18, 1973, to join multiple defendants that claimed an interest in State Leases 340 and 341.<sup>140</sup> Among the named new defendants was the State of Louisiana represented by the State Mineral Board.<sup>141</sup> Roussel again amended his petition on April 29, 1974, to add additional defendants with interests in the subject leases.<sup>142</sup>

Exceptions to Roussel's amended petitions were heard by the district court on February 20, 1976, with the Reasons for Judgment on the exceptions being issued on May 11, 1977, and a Judgment signed on those Reasons on August 2, 1977. Once again, the State and the State Mineral Board were dismissed from the litigation on exceptions of no right of action.<sup>143</sup> Although The Texas Company was also dismissed under a no cause exception,<sup>144</sup> the remaining defendants were not dismissed, thus allowing the suit to continue.

The next significant activity in the *Roussel* case came on November 21, 1979, when the remaining defendants filed a motion for summary judgment asserting the following:

- A) The state mineral leases involved in this case were issued in accordance with the law in effect at the time and neither fraud nor conspiracy was involved.<sup>145</sup>
- B) During the relevant period of time, there was no prohibition against defendants or their respective ancestors in the title acquiring an interest in mineral leases.<sup>146</sup>

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<sup>139</sup> 274 So.2d at 211.

<sup>140</sup> Amended Petition at ¶ 1.

<sup>141</sup> *Id.*

<sup>142</sup> Supplemental Amended Petition at ¶ I.

<sup>143</sup> Reasons for Judgment at 5.

<sup>144</sup> *Id.* at 4.

<sup>145</sup> Motion for Summary Judgment at 46.

## ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

- C) The release and compromise agreements between the State Mineral Board, The Texas Company, Mr. Burton, and Win or Lose Corporation (Independent Oil and Gas Company, Inc.) in 1943 bar prosecution of his suit.<sup>147</sup>
- D) Prosecution of this suit is barred by the well recognized and judicially accepted principle and doctrine of estoppel.<sup>148</sup>

Inexplicably (at the time), Roussel did not respond to the remaining defendants' motion for summary judgment. Accordingly, the court issued Reasons for Judgment on May 7, 1980, noting that the plaintiff's failure to respond to the motion for summary judgment required a dismissal of the suit, and a Judgment was entered to that effect on June 16, 1980.

Because of Roussel's failure to respond to the motion for summary judgment filed in 1979, there was no consideration of the merits of his claims in this litigation after more than ten years of legal wrangling. This seeming oddity was only definitively answered when Roussel published his memoirs in 1997.<sup>149</sup> In that book, Roussel stated that he did not respond to the motion for summary judgment and that he otherwise let the case against State Leases 340 and 341 lapse because of his friendship with Earle Christenberry and Seymour Weiss.<sup>150</sup> Because of this personal decision in the 1970s, there is no substantive ruling on Roussel's allegations in his suit.<sup>151</sup>

One of the interesting side-effects of the *Roussel* suit was that then-Attorney General William Guste filed a substantive brief in this matter that summarized the history of the Win or

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<sup>146</sup> *Id.* at 51.

<sup>147</sup> *Id.* at 54.

<sup>148</sup> *Id.* at 60.

<sup>149</sup> Louis J. Roussel, Jr. and Sheree Kerner, *FRIENDS, ENEMIES & VICTIMS: THE PERSONAL SUCCESS OF A SEVENTH-GRADER, THE AUTOBIOGRAPHY OF LOUIS J. ROUSSEL, JR.* (Louis Roussel 1997).

<sup>150</sup> *Id.* at 89.

<sup>151</sup> This point is important to note, as, in his autobiography, Roussel notes that "[t]he suit, accusing the six of cheating the state out of \$250 million was valid and was sent to a state court for trial." *Id.* With this statement, Roussel implies that the First Circuit had substantively ruled on his allegations. It did not. As discussed *supra*, the First Circuit merely ruled on exceptions and allowed the merits of the case to go forward. There was no substantive decision in this case. "The six" that Roussel referred to in the above quote are: Huey P. Long, Oscar K. Allen, James A. Noe, Earle J. Christenberry, Seymour Weiss, and Alice L. Grosjean. *Id.* at 87.

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Lose Corporation investigations by the Office of the Attorney General to date and assessed the chances for success at the time and based on the available evidence. In this regard, Guste stated that, “this investigation, to date, has produced no legally admissible evidence of fraud.”<sup>152</sup> Guste went on to state that,

At the time of the execution of mineral leases 340 and 341, by the defendant, then Governor, there was no statute prohibiting him from owning stock in a corporation securing oil or gas rights under a State lease granted to another by him. Nor was there a statute which prohibited the governor or any public official from directly bidding for, and as high bidder, securing State mineral leases.<sup>153</sup>

Thus, when this issue was before the courts in the 1970s – more than thirty (30) years closer in time to the events that are the subject of this report – the Attorney General at the time could find neither a factual nor a legal basis to support the allegations made by Roussel.

Although the Attorney General did weigh in in this matter, his involvement as an amicus and the State’s peripheral involvement in the case as a party defendant would not preclude the State from bringing an action today on these same questions. However, the above statements, which are statements of record from the State’s chief legal officer at the time, would likely constitute substantial statements against interest should an action be brought today.<sup>154</sup> Such statements against interest would create a substantial evidentiary difficulty for the State in any present-day litigation.

Although these cases are useful for providing a historical background to the Win or Lose matter, they resulted in little, if any, substantive examination of the issues raised in the “Dirty

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<sup>152</sup> Amicus Curiae Brief of Attorney General William Guste at ¶ XXVIII.

<sup>153</sup> *Id.* at ¶ XXIX.

<sup>154</sup> With regard to a statement against interest, we here refer to that evidentiary exception to the hearsay rule which Maraist, *et al.*, has described thusly:

Under the Louisiana rule, the statement at the time it was made must have been “so far contrary to the declarant’s pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, that a reasonable man in his position would not have made the statement unless he believed it to be true.”

19 LA. CIV. L. TREATISE, *Evidence And Proof* § 10.8 (2d ed.).

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Deeds” stories. The case that came the closest to substantively addressing these issues was the Roussel case. However, because that case never advanced past the procedural stages, there was no definitive outcome. As can be seen throughout this report, the *U.S. v. Noe* matter, though largely unrelated to the Win or Lose issues (i.e., it was a tax evasion case) sheds, through the trial transcript, considerable light on the history and motives of the individuals involved in the Win or Lose matter. With these two exceptions noted, the previous litigation related to the Win or Lose leases is largely uninformative with respect to the currently-raised issues and these cases are likely not controlling of any potential action that the State or a private party (in the vein of Mr. Roussel) may attempt to institute against the current Win or Lose interests. Because of the lack of guidance from these cases, the current analysis herein reviews all of the issues anew.

### **B. Historic Attorney General Reviews of the Win or Lose Leases**

In addition to the lawsuits review above, the Office of the Attorney General has also examined the legality and propriety of the Win or Lose leases several times. Many of these reviews were the fulfillment of campaign promises by Attorney General Eugene Stanley, who vowed to investigate alleged wrongdoing associated with the letting of State mineral leases.<sup>155</sup> The news coverage of the time reveals difficult relationships among Attorney General Stanley, the State Mineral Board, and Governor Sam Jones, largely centered around whether sufficient evidence existed to bring any actual litigation against the Win or Lose State leases.<sup>156</sup> A brief

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<sup>155</sup> Anon., *Stanley Declares Issue is Freedom Versus Slavery*, THE MORNING ADVOCATE (Jan. 14, 1938).

<sup>156</sup> Anon., *Action on Oil Lease Frauds in Louisiana Urged by Gov. Jones*, 70(343) THE SHREVEPORT TIMES 1, 10 (May 9, 1943); Anon., *Jones Asks Action on Oil Leases Let by Long Regime*, 105 THE TIMES-PICAYUNE 1 (May 9, 1943); Anon., *Mineral Board to Hire Special Counsel if Stanley Doesn't Act*, 70(346) THE SHREVEPORT TIMES 1, 2 (May 12, 1943); Anon., *Mineral Board to Quiz Stanley at Meeting Today*, 70(354) THE SHREVEPORT TIMES 1, 6 (May 20, 1943); Anon., *State Body Asks Special Counsel*, 147 THE TIMES-PICAYUNE 1 (May 31, 1943).

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review of the results of those examinations is contained herein and complete copies of the documents related to these examinations are contained in the Appendix.<sup>157</sup>

### **1. The 1936 Gardiner Letter**

On February 27, 1936, Special Assistant to the Attorney General, Lessley P. Gardiner, issued a letter detailing the results of an inquiry into the validity of State Lease 327.<sup>158</sup> Citing Acts 1915, No. 30 (as amended, Acts 1926, No. 315), Gardiner noted that the governor was vested with the authority to execute State mineral leases to the highest bidder, “under such terms and conditions as to him seem proper.”<sup>159</sup> Gardiner also noted that, as to State Lease 327, all formalities were complied with and that the bid from W.T. Burton was the only one received for this lease, and the lease was duly executed in his favor.<sup>160</sup> Gardiner’s assessment of the applicable law is accurate and, at the time, the governor held plenary authority to grant State mineral leases.<sup>161</sup> A review of the public records related to State Lease 327 also indicates that Gardiner’s statements about the bid process were accurate. This lease was one of the Win or Lose leases.

### **2. The 1941 Gensler Memorandum**

On April 16, 1941, Philip Gensler, a Special Assistant Attorney General, authored a memorandum analyzing State Lease 335.<sup>162</sup> Although this memorandum does not so state, it appears to be a preliminary assessment or a status report of ongoing inquiries. With respect to

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<sup>157</sup> This particular review excludes the Attorney General’s participation as an amicus curiae in the *Roussel v. Noe* matter. On September 15, 1973, Attorney General William J. Guste, in his amicus brief, noted that the Attorney General’s investigation of this matter produced no legally admissible evidence of fraud. Aside from that mention, there is no substantive analysis of the facts that is worthy of review here and that document is thus excluded here.

<sup>158</sup> Letter from Lessley P. Gardiner to The McGinley Corporation, dated Feb. 27, 1936. The letter appears to have originated as an informal Attorney General’s Opinion request from a private party which was answered formally through this letter. The letter is a part of the State Lease 327 public records and is also attached to this report as Appendix 20.

<sup>159</sup> *Id.* at 1.

<sup>160</sup> *Id.*

<sup>161</sup> See William O. Bonin, *Public Mineral Leasing in Louisiana*, 27 TUL. L. REV. 246, 246-247 (1953).

<sup>162</sup> Philip Gensler, Memorandum Re State Lease No. 335 Investigation (Apr. 16, 1941) (attached hereto as Appendix 21).

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this lease, Gensler concluded, should a proper investigation be made, that The Texas Company would be shown to have known or to have condoned allegedly inappropriate actions of various officials involved in the granting of State Lease 335, and, therefore, that it was not an innocent third party purchaser of its rights in the lease.<sup>163</sup> However, Gensler stopped short of concluding that actual fraud was involved in the granting of the lease due to a lack of evidence. Gensler also noted that, should a suit to cancel these leases be instituted, of necessity, the suit would actually have to be filed against W.T. Burton, Delta Development Company, and the Win or Lose Oil Corporation (by then, the Independent Oil and Gas Company, Inc.).<sup>164</sup> With the foregoing in mind, Gensler did note that further investigation of his preliminary findings should be made.<sup>165</sup> Gensler further noted that, if evidence proving fraud could not be obtained, then the continued viability of State Lease 335 should be examined from the perspective of reasonable development of the lease as required by the law.<sup>166</sup>

In the end, Gensler essentially defers the questions of illegality to the Crime Commission and makes no legally-binding conclusions. Certainly, his observation that The Texas Company may not have acquired its interest in State Lease 335 is intriguing and would undermine a claim that The Texas Company (later Texaco) held its interests in this lease in good faith.<sup>167</sup> However, Gensler provides no evidence to support this allegation and he admits that, absent such evidence, there is no basis for attacking the legality of the lease based upon this analysis.

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<sup>163</sup> *Id.* at 10-11.

<sup>164</sup> *Id.* at 11.

<sup>165</sup> *Id.* at 10-11.

<sup>166</sup> *Id.* at 11.

<sup>167</sup> This absence of evidence to support an allegation of bad faith becomes important, as discussed at length below, when considering what rights Texaco and its subsequent iterations have in such leases today. It should be noted that, as is discussed *infra*, the Texaco Global Settlement Agreement in 1994 likely undermines pursuing any litigation theory related to Texaco's bad faith as to any of the leases covered by that agreement from 1994 to the present.



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### **3. The 1941 Perrault Memorandum and Analysis**

Shortly after the release of Gensler's April 16, 1941, memorandum, Second Assistant Attorney General W.C. Perrault issued a memorandum to Attorney General Eugene Stanley on July 15, 1941, detailing many of the points made in the earlier Gensler memorandum.<sup>168</sup> As an initial matter, Perrault stated that, "[a] number of suspicious circumstances attended the execution of the ... leases."<sup>169</sup> The State Leases examined by Perrault were: State Leases 309, 318, 323, 334, 335, 340, 341, and 344.<sup>170</sup> Perrault did note that large profits were made by the original lessee by the assignment of some of the leases involved in this inquiry.<sup>171</sup>

Some of the specific problems that Perrault identified with the subject leases follow. There were some instances where, "bids accepted by the State were typewritten and the amount of the bid filled in in blank places on the day of the acceptance...."<sup>172</sup> In other instances, Perrault states that, "...it was questionable if the [State] accepted the best bid...."<sup>173</sup> Perrault also identifies other instances, "...where the best bid was unquestionably not accepted but a lower bid

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<sup>168</sup> Memorandum from Second Assistant Attorney General W.C. Perrault to Attorney General Eugene Stanley regarding State Mineral Leases Nos. 309, 318, 323, 334, 335, 340, 341, and 344, July 15, 1941 (attached hereto as Appendix 22) (hereinafter referred to as the "Perrault Memo").

<sup>169</sup> *Id.* at 1.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* It is important to note that, although this information is interesting, there is nothing unlawful about a State lessee obtaining a lease and then selling, whether immediately or at some point after the awarding of the lease, rights in the lease to third parties at a profit. See La. R.S. 30:128 (which currently requires SMEB approval for assignments, but contains no restrictions as to profit making on such assignments).

<sup>172</sup> *Id.* For this problem, Perrault references State Leases 318, 334, 335, 340, 341, and 344. This Office has reexamined the bid forms for these leases and can confirm that the amounts on these bid forms were, indeed, hand written into typed forms. However, unlike Perrault's conclusion that the, "blank spaces [were filled in] on the day of the acceptance," our review of these documents demonstrates that there is no indication as to when these amounts were written into the forms. Thus we cannot now conclude that this issue identified by Perrault amounts to a problem that would constitute a legal error for the subject leases. The bid forms for these six leases are attached hereto as Appendix 23.

<sup>173</sup> *Id.* In this regard, Perrault references State Lease 323. A review of the available public records related to this lease does not show any connection to Win or Lose Corporation aside from the fact that the lease was granted by Governor Noe. In addition, this lease is no longer viable. It was released on July 22, 1953. Accordingly, this lease is not considered further in this report.

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actually accepted....”<sup>174</sup> In addition, Perrault cites instances where an executed lease, “carried no cash consideration as required by the advertisement...,”<sup>175</sup> and where, “only a nominal cash consideration was paid for the lease....”<sup>176</sup> Finally, Perrault states that, “in all of the leases the Win-or-Lose Oil Company, composed principally of officials of the former government, winds up with an interest.”<sup>177</sup>

In spite of these identified problems with the leases, Perrault concluded that, due to a lack of proof of fraud, the insinuation of fraud from the circumstances was legally insufficient to proceed with a prosecution aimed at cancelling these leases. In that regard, Perrault states:

Despite the suspicious circumstances surrounding the execution of these leases, as above pointed out, I am not prepared to say that fraud entered into these transactions. Investigation thus far made has unearthed none, and no further evidence can be secured except from those who may have participated in the fraud, if any fraud existed. I think, therefore, that these leases cannot successfully be attacked for fraud because of lack of proof. Mere suspicion or probability of its existence are insufficient under the law.<sup>178</sup>

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<sup>174</sup> *Id.* For this situation, Perrault references State Lease 335. A review of the public records for this lease reflects that only one bid was submitted – that of W.T. Burton. No higher or lower bids for this lease exist.

<sup>175</sup> *Id.* The example of this scenario is cited as State Lease 309. Perrault is correct that there was no cash bonus paid for State Lease 309. There does not appear to be any explanation for this absence. It is important to note, however, that none of the law related to mineral leasing at the time required such consideration. Acts 1915, No. 30, as amended by Acts 1926, No. 315. However, the same law did provide the governor with plenary authority to accept or reject any bids in his discretion. *Id.* It is thus probable that, as there was no legal requirement for the consideration, and because the governor had plenary authority to accept or reject bids, he was likely authorized to waive this requirement if it was not met. This probability is supported by a letter to Governor Allen by Attorney General Porterie in which the Attorney General stresses the plenary authority of the governor in the granting of mineral leases under the terms and conditions that the governor, in his discretion, sees fit. Letter from Gaston L. Porterie, Attorney General, to Oscar K. Allen, Governor, dated Jan. 23, 1936 (attached hereto as Appendix 24). Further, testimony elicited during the *U.S. v. Noe* trial, discussed *supra*, indicates that the consideration provided for State Lease 309 was the agreement to drill 50 wells rather than paying a cash bonus. Testimony of Leonard M. Levy, Trial Transcript at 68, *United States v. Noe*, Docket No. 20,070 (E.D. La.).

<sup>176</sup> *Id.* State Lease 323 is cited for this problem.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* At the end of this statement, Perrault cites to “9 La. Dig., Section 50, Page 95, citing numerous cases.” Although the page numbers differ today, the general citation, “9 La. Dig., Section 50,” remains the same as it was in 1941. It is from the Louisiana Digest and it deals with the presumptions and burdens of proof for fraud. Rather than simply citing to this section of the Louisiana Digest, it seems more appropriate to actually cite some of the cases that Perrault would have seen in the Digest in 1941. In *Angichiodo v. Cerami*, 35 F.Supp. 359, 369 (W.D.La. 1940), a Louisiana federal court noted that, “[f]raud is never imputed except on legal and convincing evidence produced by the one alleging it.” In addition, the Louisiana Supreme Court, in *Mutual Life Ins. Co. of New York v. Rachal*, 166 So. 129 (La. 1936), noted that, “[f]raud is never presumed, and the burden rests upon the person alleging fraud to prove it.” See also *Garnier v. Aetna Ins. Co. of Hartford, Conn.*, 159 So. 705 (La. 1935) (same); *Strauss v. Ins. Co. of North America*, 102 So. 861 (La. 1925) (same); *Hamilton v. Hamilton*, 57 So. 935 (La. 1912) (same); *Beaux v.*

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This one statement appears to be the most significant indictment of the conspiracy theories surrounding the Win or Lose leases that has existed since their inception in the 1930s. There is no reasonable basis on which to doubt or deny Perrault's assessment of the proof problems for making a case for fraud. Bound by the fraud laws of the time, any new suit to prove what Perrault did not believe could be proven in 1941 likely would be impossible today. As Perrault correctly notes, mere insinuation and innuendo that something is amiss with the subject leases does not create a colorable basis upon which to bring a fraud suit. The missing component to bringing such a suit, if fraud did exist with respect to the granting of these leases, is, as Perrault notes, evidence from those involved in the fraud. In 1941, many of the key individuals noted in Part II of this report were alive and interviewable. In other words, in 1941, with the exceptions of Huey P. Long and Oscar K. Allen, the Attorney General's Office could have probed further into the fraud allegations by collecting information from living informants. Today, the necessary individuals to take a fraud insinuation from a mere allegation to a colorable legal claim – James A. Noe (d. 1976), Seymour Weiss (d. 1969), and Earle Christenberry (d. 1980) – are dead. Thus, the missing evidence in this regard is lost forever. This latter statement is tempered by the existence of the 1942 trial testimony from the *U.S. v. Noe* matter. However, even questioning by federal prosecutors in that trial elicited no evidence of fraud.

In defense of the Attorney General's Office in 1941, a later letter by Special Assistant Attorney General Philip Gensler, contains the suggestion that the primary reason that there was no subsequent investigation of those alive with knowledge of the acquisition of the subject leases

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*Broussard*, 40 So. 639 (La. 1908) (same). In addition to these cases, in 1941, there were an additional twelve appellate court cases in the Louisiana Digest in which the various courts espoused the same principle. The purpose of this examination of Perrault's citation is to note that Perrault's conclusion that fraud is difficult to prove and cannot be based upon supposition was soundly based upon the Louisiana jurisprudence at the time. The same basic standard of proof for fraud applies today. See e.g., *Hall v. Arkansas-Louisiana Gas Co.*, 368 So.2d 984, 993 (La. 1978), *affirmed in part and vacated in part on other grounds*, 452 U.S. 571 (1981) ("It is well settled that one who alleges fraud has the burden of establishing it by legal and convincing evidence since fraud is never presumed, and that to establish fraud exceptionally strong proof must be adduced.").

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appears to have been a matter of lack of support.<sup>179</sup> In this regard, Gensler notes that, “[d]ue to the limited personnel of our office and lack of appropriation, the Attorney General’s Office has not been offered the opportunity of making thorough investigation of these leases....”<sup>180</sup> This problem is a similar theme that resonates through the history of the Win or Lose matter.<sup>181</sup>

Perrault, in his 1941 memorandum, goes on to note that, even as early as 1941, most of the subject mineral leases were held by third parties, making their cancellation even more difficult. With respect to this problem, Perrault states:

All of the leases are presently owned by third persons who, presumably at least, dealt on the faith of the public records in acquiring them, and they cannot be set aside to the prejudice of these persons unless it be shown by competent evidence that they had prior knowledge of any fraud practiced upon the State by the original lessees. We have no such proof.<sup>182</sup>

As will be discussed in more detail later, the same problem, with an additional seventy-plus-years of assignments and other transfers of the subject leases, continues to constitute an obstacle to any State action today.

### **4. The 1937 Wood Memorandum**

On July 6, 1937, Mr. C.C. Wood, of the Office of the Attorney General, issued a memorandum analyzing potential problems with State Lease 318.<sup>183</sup> In this memorandum, Wood notes that there is no term identified in State Lease 318.<sup>184</sup> However, he also notes that, while this is an odd omission from the lease, there are other provisions of the lease that trigger

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<sup>179</sup> Letter from Special Assistant Attorney General Philip Gensler to State Mineral Board, dated Oct. 31, 1941 (attached hereto as Appendix 27).

<sup>180</sup> *Id.* at 2.

<sup>181</sup> See H.R. 88 of 2012, which contained a mechanism to fund the Louisiana Attorney General’s Office to investigate the Win or Lose matter and which was defeated in the House Judiciary Committee on May 17, 2012.

<sup>182</sup> Perrault Memorandum, *supra*, at 1.

<sup>183</sup> C.C. Wood, Memorandum on State Lease 318, Oct. 8, 1941. A copy of this memorandum is attached hereto as Appendix 25.

<sup>184</sup> *Id.* at 1.

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payments from the lessor, W.T. Burton, in order to maintain the lease in the event that no production is underway.<sup>185</sup> Interestingly, Wood states that,

According to the information that we have, a conspiracy was confected between Burton and James A. Noe whereby Burton was to secure the lease ... [and] assign the lease to The Texas Company....<sup>186</sup>

Wood goes on to discuss how the private interests in this lease were to be divided among Burton, The Texas Company, and Win or Lose.<sup>187</sup> Although Wood specifically refers to “information that we have,”<sup>188</sup> he does not elaborate on what this information might be. During the court of researching this matter, no information to support this conspiracy claim has been identified. Wood does allude to the possibility that the information that he refers to in the above quotation came by word-of-mouth from someone who witnessed Burton’s grand jury testimony. However, there is nothing concrete in Wood’s memorandum on this point and efforts as part of the current research to locate information related to the grand jury have been unsuccessful.

Wood also notes some of the proof problems inherent in the conspiracy allegation. In this regard, he refers to Burton’s grand jury testimony in which Burton is alleged to have stated that Governor Allen, the issuer of State Lease 318, although a participant in the lease later through the Win or Lose Corporation, did not know anything of the connection that he (Allen) would later have to the lease that he granted to Burton.<sup>189</sup> Wood believed that this lack of a connection to Allen was defeating of a viable conspiracy claim.<sup>190</sup> In this regard, he stated that

If we could show that Allen was also a member of this conspiracy, we feel certain that this lease could be set aside as having been obtained by fraudulent means, but unless we can show that, the possibility of success along this course is remote.<sup>191</sup>

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<sup>185</sup> *Id.* at 1-2.

<sup>186</sup> *Id.* at 3.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 4.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

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Presumably, the primary reason that such involvement could not be shown to have occurred resulted from Allen's untimely death and the fact that any testimony regarding his involvement would likely be subject to hearsay exceptions.

However, Wood also noted that, if it could be proven that The Texas Company had participated in the actual acquisition of State Lease 318 rather than merely being a third party acquirer of an interest from Burton, then the lease may be voidable.<sup>192</sup> However, aside from suggesting that The Texas Company may have been induced not to bid on the lease in order to keep the actual lease price artificially low, Wood offers no other explanation of The Texas Company's involvement in the letting of State Lease 318 and he does not refer to any evidence (nor has any such evidence since been identified) that supports this theory.<sup>193</sup>

Wood's memorandum also includes several other theories for invalidating State Lease 318, including, but not limited to cancelling the lease for the lessee's failure to timely pay rentals.<sup>194</sup> Although State Lease 318 was the subject of the *State v. Burton* suit in the Fourteenth Judicial District, that suit was dismissed upon a settlement to which the State was a party. Thus, even if Wood's theories for cancelling the lease were correct, the 1943 settlement over the lease effectively estops the State from now complaining of the results of that settlement, which included the continued existence of the lease.

Nonetheless, State Lease 318 no longer exists. It was released in portions, concluding with a final release in 1975. Thus, because the lease was allowed to continue after the settlement of the *State v. Burton* litigation and because the State then obtained benefits from its continuance until its release in 1975, there is nothing to cancel now and, for the reasons set forth below, it is

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<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 5-7.

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inadvisable to seek to rescind the rights that flowed from the lease when it was extant (if such is even a possibility, which is doubtful).

### **5. The 1941 Gay Memorandum**

On October 8, 1941, Edward J. Gay, Jr., with the Attorney General's Office, produced a memorandum analyzing the legality and validity of State Lease 340.<sup>195</sup> In this review, Gay notes that this lease, which was granted to W.T Burton by Governor James A. Noe on February 7, 1936, did not include an overriding royalty.<sup>196</sup> According to Gay, the overriding royalty of up to \$500,000.00 from a 0.78125%-share (*i.e.*,  $\frac{1}{128}$ ) of production was added by way of a rider after the submission of the original bid.<sup>197</sup> However, it is unclear upon what Gay based this conclusion regarding the later addition of a rider – a document that, today, is often made a part of an original lease document. Gay does properly note that Burton's overriding royalty offer to the State (above and beyond the mandatory 12.5% royalty), whenever it was submitted, was substantially less than that of other bidders, particularly the bid of Gulf Company, which included an overriding royalty of \$1,250,000.00.<sup>198</sup> However, none of the other bidders on State Lease 340 offered a bonus or a rental to the State that was as large as that offered by Burton.<sup>199</sup> Because of the differences between the overriding royalty offers and the bonus/rental submitted

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<sup>195</sup> Memorandum from Edward J. Gay, Jr., Office of the Attorney General, entitled In re: State Lease No. 340, dated Oct. 8, 1941 (attached hereto as Appendix 26).

<sup>196</sup> *Id.* at 5. The term "overriding royalty," which differs from royalties that are typically received by a landowner as the grantor of a mineral lease, is defined as,

an interest carved out of the lessee's working interest. It entitles its owner to a fraction of production free of any production or operating expense, but not free of production or severance tax levied on production. An overriding royalty may be created by a grant or by reservation. Commonly, an override is reserved by the assignor in a farmout agreement or other assignment.

An override's duration corresponds to that of the lease from which it was created.

Toalson, *supra*, at 191. See also Williams & Meyers, *supra*, at 410. It is important to note, because of the reality that many of the Win or Lose leases are subject to overrides in favor of various right holders, that such an activity was not and is not uncommon in Louisiana (or elsewhere). See John M. McCollam, *A Primer for the Practice of Mineral Law Under the New Louisiana Mineral Code*, 50 TUL. L. REV. 732, 828 (1976).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

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by the bidders for State Lease 340, Gay did not (and likely could not) make a determination as to whether the lease to Burton constituted the lease that was most advantageous to the State. However, he did note that, “[t]he main point to be considered, therefore, is whether or not the lease was granted to the person submitting the most advantageous bid as required by law.”<sup>200</sup> There is no indication from this memorandum whether such a “most advantageous” analysis was ever undertaken. Gay certainly does not make any determination or declaration that the Burton bid or the subsequent lease was invalid, but merely notes the possible irregularities of the late and low overriding royalty and asks whether, considering the higher and timely bonus and rental of Gulf Company, this bid was most advantageous to the State without answering the question.

### **6. The 1941 Gensler Letter**

This letter by Philip Gensler is addressed to the State Mineral Board and it appears to summarize for the Board the findings reported in the 1941 Perrault Memorandum to Attorney General Stanley discussed above.<sup>201</sup>

For an unstated reason, Gensler’s October 31, 1941, letter to the Board refers to more State leases being reviewed than those covered by the Perrault Memorandum.<sup>202</sup> It is clear from a review of the public records that the reason for the review of these additional leases was not the involvement of W.T. Burton in the leasing, for, although he was the lessee of State Lease 42, he was not the lessee on any other of the additional leases that were unconsidered in the Perrault Memorandum.<sup>203</sup> The probable answer to why these additional leases were reviewed by the Office of the Attorney General comes from a letter from Special Assistant Attorney General

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<sup>200</sup> *Id.*

<sup>201</sup> Letter from Philip Gensler, Special Assistant Attorney General, to State Mineral Board, dated Oct. 31, 1941 (attached hereto in Appendix 27).

<sup>202</sup> The additional leases not covered in the Perrault Memorandum are: State Leases 42, 50, 164, 194, 199, 301, 331, 347, and 356.

<sup>203</sup> In addition to the Burton leases noted, *infra*, W.T. Burton was also the State’s lessee on the following State Leases granted prior to 1941 (the date of the Gensler letter and the Perrault Memorandum): 321, 322, 326, 327, 330, 332, 336, and 337. None of these leases were assigned to the Win or Lose Corporation or any of its officers.



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Edward L. Gladney, Jr., to Major B.A. Hardey, Chairman of the State Mineral Board, dated April 29, 1943, in which Gladney references “sixteen leases which the Attorney General was requested ‘to take action immediately to recover for the State of Louisiana all profits or overriding royalties fraudulently or illegally obtained in connection with any mineral lease covering State owned property...’”<sup>204</sup> Apparently, these additional, non-Burton, non-Win or Lose leases were part of a broader request from the State Mineral Board for the Attorney General to review a collection of leases for possible illegalities or underdevelopment.<sup>205</sup> Thus, Gensler’s 1941 letter to the State Mineral Board would constitute an interim report on each of these reviews.

**Table 3. List of leases included in Gensler Letter not otherwise analyzed in this report and the status of those leases.**

State Lease Number	Lessee	Assignment? <sup>206</sup>	Released? <sup>207</sup>
42	W.T. Burton	No	N/A
50	R.F. Hamilton	No	N/A
164	Gulf Refining Company of Louisiana	No	5/21/41
194	E.C. Andrus	No	11/9/00
199	Louisiana Land & Exploration	No	N/A
301	S.A. Guidry	No	N/A
331	J.H. Reeves	No	12/10/42
347	The Texas Company	No	6/8/02
356	The Texas Company	No	N/A

<sup>204</sup> Letter from Edward L. Gladney, Jr., Special Assistant Attorney General, to Major B.A. Hardey, Chairman, State Mineral Board, dated Apr. 29, 1943 (attached hereto as Appendix 28).

<sup>205</sup> Copies of each of these leases are attached hereto as Appendix 29. The broader inquiry by the Attorney General is discussed in an article in *The Times-Picayune* in 1940. In this article, Attorney General Stanley details his intent to investigate numerous pre-State Mineral Board leases for unlawful activity and failure to develop the leases. Associated Press, *Stanley Plans Suits for Hundred Million in State Oil Leases*, 204 THE TIMES-PICAYUNE 1 (Aug. 15, 1940).

<sup>206</sup> This column refers to whether there was ever an assignment of these leases to the Win or Lose Corporation or any of its officers.

<sup>207</sup> This column refers to the date on which the final release was made. The “N/As” in this column refer to the reality that the leases with that annotation are still, at least in part, active leases at the time of this writing.

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However, Gensler, while noting that the investigation of the subject leases is not complete, stated that, thus far, no evidence of fraud had been found.<sup>208</sup> It is important to note that Gensler states in this letter that, “[i]n practically all of these instances, the State has received rentals and royalties from said leases.”<sup>209</sup> This is an important point that cannot be overstated. Pursuant to Acts 1915, No. 30, as amended by Acts 1926, No. 315, the State could not lease its property for oil and gas production with less than a 1/8 (12.5%) royalty reserved to the State. The royalty rates at which the State would be paid for each of the leases noted in the Perrault Memorandum, *supra*, were all 1/8 – precisely consistent with what the law required.<sup>210</sup> In other words, the State, regardless of whether and to whom the leases were awarded or assigned, received by contract all of the royalties that it was due under the law.

Based upon the preliminary results reported in this letter, Gensler concluded that the Attorney General’s Office is, “...not prepared to prove fraud by legally admissible evidence with reference to the above referred to suspicious circumstances.”<sup>211</sup> In addition to this assessment, Gensler goes on to note that,

[m]ost of these leases are held by third parties at the present time, and in order to cancel same as of their inception, fraud would have to be shown in the present holders, or that they did not acquire in good faith on the face of the public records.<sup>212</sup>

In other words, if there had been any fraud in the acquisition of the subject leases from the State, the parties with an interest in said leases as of the date of this letter (*i.e.*, 1941), relying on the public records (as Louisiana law encourages and permits) would have “clean hands” and could

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<sup>208</sup> Gensler Letter, *supra*, at 2.

<sup>209</sup> *Id.*

<sup>210</sup> Acts 1926, No. 315.

<sup>211</sup> Gensler Letter, *supra*, at 2.

<sup>212</sup> *Id.*

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not be stripped of their rights under these leases that were acquired in good faith. As is discussed in more detail, *infra*, the same result obtains today.

The letter goes on to discuss matters related to whether these leases had been properly developed as of the date of the letter. Gensler admits that the Attorney General's Office is not equipped to make such assessments and recommends that more information be supplied to the State Mineral Board by the State Geologist, the State Board of Engineers, and the Conservation Department to answer this question.<sup>213</sup>

### **7. The 1943 Gladney Letter**

On May 18, 1943, Edward L. Gladney, Jr., Special Assistant Attorney General, authored a letter to the State Mineral Board detailing the validity and viability of State Lease 309.<sup>214</sup> Much like the earlier analyses of the Win or Lose leases, Gladney concluded as to State Lease 309 that, “[t]here is no evidence to indicate fraud in connection with this lease and its amendment. Certainly a suit should not be filed based upon nothing more than ‘suspicious circumstances.’”<sup>215</sup>

It is important to bear in mind that State Lease 309 was a lease actually obtained by James A. Noe in his own name. Noe was not the Governor at the time, but rather was a State Senator (the lease was granted on October 23, 1934). Although this lease is not a W.T. Burton lease, it eventually (partially) became part of the Win or Lose assets.<sup>216</sup>

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<sup>213</sup> *Id.* at 2-3.

<sup>214</sup> Letter from Edward L. Gladney, Jr., Special Assistant Attorney General, to State Mineral Board, dated May 18, 1943 (attached hereto as Appendix 30).

<sup>215</sup> *Id.* at 15.

<sup>216</sup> Noe assigned his interests in State Lease 309 “to the Win or Lose Corporation on November 20, 1934, in exchange for 98 shares of its stock.” *Id.* at 5.

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In this memorandum, Gladney reviewed the applicable law at the time. Gladney found, with respect to the issue of whether Noe was a proper lessee and whether Governor Allen, as a shareholder in the Win or Lose Corporation, could authorize such a lease, that,

[a]t no time during any of the foregoing transactions [(i.e., the bidding and leasing process)] was there a prohibitory statute that rendered Noe (State Senator from May 9, 1932 to February 26, 1935, and Lieutenant Governor from February 26, 1935 to January 28, 1936, and Governor from January 28, 1936 to May 12, 1936) ineligible to bid on and secure a lease on State mineral lands. Nor was Governor Allen, a shareholder in the Win or Lose Corporation, enjoined by statute from owning stock in a corporation securing oil or gas rights under a State lease granted to another by him.<sup>217</sup>

This analysis led Gladney to the conclusion that there were no illegal or unlawful actions that resulted in the leasing of State Lease 309.<sup>218</sup>

In addition to the initial leasing of State Lease 309, subsequent questions were raised regarding whether sufficient development of the lease had occurred to maintain the 3,300 original acres of the lease.<sup>219</sup> During the issuance of the lease in 1934 and the amendment of the lease related to possible development insufficiencies in 1935, six wells were drilled. Subsequent to the amendment, Gladney notes that an additional 35 wells were drilled on the property by May 11, 1943 (for which the State received \$159,137.85 in royalties),<sup>220</sup> thus concluding that there had been sufficient development of the lease to maintain it as to the entire acreage.<sup>221</sup>

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<sup>217</sup> *Id.* at 15.

<sup>218</sup> *Id.*; *See also id.*, at 9, in which Gladney notes that “[w]e are not aware of any charge of fraud in the granting of the lease on October 23, 1934. But on [*sic*] irregularity has been noted. It is, in our opinion, of no legal consequence. Noe’s bid failed to respond to the published notice in that it did not offer to the State a bonus.” With regard to this “irregularity,” Gladney noted that, because the main aim of the lease was development and the acquisition of royalties by the State, it could not be said that the lack of a bonus was problematic and that, regardless of the lack of adherence to the notice, it was well within the Governor’s (Allen’s) discretion to grant the lease if he believed such a bid was in the best interests of the State. *Id.* at 9-10.

<sup>219</sup> *Id.* at 5-9.

<sup>220</sup> *Id.* at 9. A very rough calculation of the inflationary value of this \$159,137.85 figure from 1943 in 2013 dollars is \$2,142,795.75. In addition, Gladney notes that the State also received \$73,500.00 during this period in rentals from State Lease 309 (or \$989,679.62 in 2013 dollars). *Id.* The current dollar calculations were made using the CPI Inflation Calculator, available online at <http://data.bls.gov/cgi-bin/cpicalc.pl>.

<sup>221</sup> *Id.*

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In this memorandum, Gladney also goes to great lengths to examine the validity of the amended agreement to and the assignments of State Lease 309.<sup>222</sup> The latter is of particular import to the current inquiry, as it is through assignments that the Win or Lose Corporation acquired its interests in all of the leases noted in this report. Gladney, after reviewing the circumstances surrounding these assignments and the amendment, found no legal error sufficient to invalidate the lease.<sup>223</sup> Further, Gladney states that, with regard to a State Mineral Board's resolution seeking that the Attorney General, "recover for the State 'all profits or overriding royalties fraudulently or illegally obtained...,'"<sup>224</sup>

[u]nless and until the lease be annulled and [set] aside, we can conceive of no legal theory under which the State would have a right to participate in the profits derived from the sale of the lessee's interest. Even if the contract is invalidated, we can find no precedent in Louisiana jurisprudence which would permit recovery by the State of profits from the transaction to which it is not a party.<sup>225</sup>

The above-quoted language from this 1943 analysis of State Lease 309 is particularly prophetic with regard to the current request from the SMEB. As is evident from the comprehensive analysis of numerous legal theories below, the same lack of privity between the State and the third party assignees and others exists today as it did in 1943. Thus, the same problem of recovery exists.<sup>226</sup>

Of additional import in the 1943 Gladney Memorandum is a discussion of Gensler's 1941 Memorandum analyzing the validity of State Lease 309.<sup>227</sup> In this discussion, Gladney

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<sup>222</sup> *Id.* at 11-15.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 13.

<sup>225</sup> *Id.*

<sup>226</sup> The difference between the current report and Gladney's 1943 Memorandum in terms of the statement that "...we can conceive of no legal theory..." is that, rather than Gladney's conclusory statement regarding a lack of a legal theory, this report, as set forth *infra*, examines the possible applicability of a panoply of potential theories to the facts of this matter.

<sup>227</sup> *Id.* at 16.

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acknowledges that Gensler originally called for the filing of suit to annul State Lease 309.<sup>228</sup> However, as Gladney also correctly notes, Gensler's analysis was preliminary and the latter called for additional research prior to the filing of such a suit.<sup>229</sup> Gladney's 1943 Memorandum is the additional research called for by Gensler two years before.<sup>230</sup> This more comprehensive examination identified no legal basis on which to challenge State Lease 309, leading Gladney to conclude that "on the basis of all evidence before us ... a suit by the State could not be successfully maintained and should not be instituted."<sup>231</sup>

### **C. Historic News Coverage of the Win or Lose Issues**

One of the allegations made during the course of the "Dirty Deeds" series noted in Part I(B) of this report was that the Win or Lose Corporation issue had gone largely ignored by the courts and the press, thus implying that the entire matter had flown under the radar of the public. Such an implication could not be further from reality. Part of the public records associated with the *Roussel v. Noe* matter include a massive collection of news coverage of the Win or Lose Corporation issue from 1935 through 1945. Those reports have been summarized as part of the current analysis of the Win or Lose Corporation matter and those summaries are included with this report in Appendix 31. Additional treatments of the Win or Lose matter occurred sporadically after 1945 and several of those news articles are also included in the summary accompanying this report. The purpose of including this information is to demonstrate not only that the matter is not new, but that it has been critically reviewed by the press on countless occasions since 1935.

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<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

<sup>231</sup> *Id.* at 17.

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### **IV. Implicated Leases**

Very little in terms of the substantive questions presented recently in the media was considered by the historic litigation related to the Win or Lose Corporation. Aside from some of the tangential matters addressed in the cases above, the main questions still remain: (1) Are certain State leases issued during the gubernatorial terms of Oscar K. Allen and James A. Noe lawful and valid leases?; (2) If they are not lawful and valid leases, what can be done to cancel the leases today and is such action by the State advisable?; and (3) Whether they were lawful or valid leases, was the State fairly and properly compensated under the leases? In order to answer these questions, the actual implicated leases must be identified and the field of inquiry must be narrowed to define the leases to which these questions should apply.

#### **A. Which State leases are involved in the Win or Lose matter?**

The media coverage of the “Dirty Deeds” matter discussed in Part I(B) of this report has largely focused on State Lease 340. Although this lease is spatially one of the largest of the Win or Lose leases as well as being the most complex of the leases in terms of the number of interested parties, it is by no means the only Win or Lose lease. In order to identify all State leases in which the Win or Lose Corporation, W.T. Burton, James A. Noe, or Win or Lose’s successor entity, Independent Oil & Gas, Inc., held some interest, LDOJ undertook a comprehensive review of the Department of Natural Resources’ SONRIS database. From SONRIS, the leases contained in Table 4 were identified with one or more of the individuals or entities listed above as the original lessee.

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**Table 4. Leases of which the original lessees were W.T. Burton, James A. Noe, Win or Lose Corporation, or Independent Oil & Gas, Inc.<sup>232</sup>**

<b>State Lease Number</b>	<b>Date of Original Lease</b>	<b>Original Lessee</b>
42	October 15, 1920	William T. Burton
309	October 23, 1934	James A. Noe
315	February 4, 1935	James A. Noe
318	July 2, 1935	Wm. T. Burton
321	August 17, 1935	Wm. T. Burton
322	August 17, 1935	Wm. T. Burton
326	October 22, 1935	Wm. T. Burton
327	November 5, 1935	Wm. T. Burton
330	November 26, 1935	Wm. T. Burton
332	December 3, 1935	Wm. T. Burton
334	December 30, 1935	Wm. T. Burton
335	December 13, 1935	W. T. Burton
336	November 5, 1935	Wm. T. Burton
337	December 10, 1935	Wm. T. Burton
340	February 4, 1936	Wm. T. Burton
341	February 18, 1936	W. T. Burton
344	February 27, 1936	Wm. T. Burton
469	October 10, 1940	William T. Burton
494	July 8, 1941	J. E. Farrell, M. S. Rhoads, D. J. Simmons and Independent Oil & Gas Company, Incorporated
495	July 8, 1941	J. E. Farrell, M. S. Rhoads, D. J. Simmons and Independent Oil & Gas Company, Incorporated
1329	November 12, 1947	Wm. T. Burton and Stanolind Oil and Gas Company

<sup>232</sup> Complete copies of the actual leases noted in this table are included in Appendix 32 of this report. It is important to note that, although Win or Lose Corporation is noted in the title of this Table, that corporation never acquired a mineral lease as an original lessee on State property under its original incarnation (*i.e.*, as Win or Lose Corporation as opposed to Independent Oil & Gas, Inc.).



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No leases were identified with Win or Lose Corporation as the original lessee from the State. Further, Win or Lose Corporation, Huey P. Long, Oscar K. Allen, Seymour Weiss, and Earle Christenberry were never direct lessees from the State. The only individuals identified in the “Dirty Deeds” stories with a direct lessor-lessee relationship with the State were W.T. Burton, James A. Noe, and (much later) Independent Oil & Gas Company. Further research has revealed that the following leases were, in part, assigned to Huey P. Long, Oscar K. Allen, James A. Noe, Seymour Weiss, Earle Christenberry, or Win or Lose Corporation during the period between the formation of the Win or Lose Corporation in 1934 and the end of James A. Noe’s term as governor in 1936.

**Table 5. Leases with assignments to Huey P. Long, Oscar K. Allen, James A. Noe, Seymour Weiss, Earle Christenberry, or Win or Lose Corporation between 1934 and 1936<sup>233</sup>**

State Lease Number	Assignor	Assignee <sup>234</sup>	Date of Assignment <sup>235</sup>
309	James A. Noe	Win or Lose Corp.	November 1934 <sup>236</sup>
318	Wm. T. Burton	N/A	post-Noe
334	Wm. T. Burton	N/A	post-Noe
335	W. T. Burton	N/A	post-Noe
340	Wm. T. Burton	Win or Lose Corp.	February 18, 1936
341	W. T. Burton	N/A	post-Noe

<sup>233</sup> Complete copies of the actual assignments noted in this table are included in Appendix 33 of this report, where available. It is important to note that references in secondary sources have been identified that suggest that the Win or Lose Corporation had a share in most or all of these leases prior to the bulk of the transfers available in the public records (*i.e.*, the transfers to Independent Oil & Gas Co., the successor entity to Win or Lose) in 1951. However, as is discussed more fully elsewhere in this report, there was no legal mandate for the recordation of or approval by the governor of mineral assignments during the implicated time period.

<sup>234</sup> The Assignee column only lists assignments to the parties listed in the title to Table 4 if they occurred during the period of inquiry (1934-1936). For the reasons stated in the text, it is not believed that assignments outside of this period are relevant to the inquiry.

<sup>235</sup> As with the Assignees, only those assignments occurring within the period of inquiry are noted here. Because the end of James A. Noe’s term effectively marks the end of the possible period of influence with regard to the awarding and assignment of mineral leases in this inquiry, any assignments to the individuals listed in the title to Table 5, or their descendants, are simply denoted as “post-Noe” in this column. All of the assignments for all of these leases are included in Appendix 33 of this report.

<sup>236</sup> A portion of Noe’s share of State Lease 309 was assigned to Win or Lose by Noe as his buy-in to the corporation when it was formed in 1934. *See* Win or Lose Charter.

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343	D. J. Simmons	Win or Lose Corp.	March 7, 1936
344	Wm. T. Burton	N/A	post-Noe

The leases listed in Table 5 are leases that were obtained by someone by way of assignment during the relevant years of inquiry in this matter. The relevant years of inquiry are bracketed between 1934, when the Win or Lose Corporation was formed, and May 12, 1936, James A. Noe’s last day in public office. The end date for this inquiry is May 12, 1936, because it is well documented that Noe’s gubernatorial successor, Richard W. Leche, was unfriendly to Noe,<sup>237</sup> thus making it unlikely that the former would have participated in or allowed Noe to skirt the law and illicitly acquire mineral leases from the State. Thus, it is doubtful that any undue influence of the Office of the Governor was brought to bear on mineral leases in favor of Win or Lose Corporation following Noe’s departure from that office. Finally, pursuant to Act No. 93 of 1936, the plenary authority of the Governor of Louisiana regarding the issuance of mineral leases on State lands was substantially curtailed. This Act established the Louisiana State Mineral Board and vested leasing authority under the auspices of that body.<sup>238</sup> Thus, following the enactment of this law, which went into force on June 26, 1936, the Governor could no longer

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<sup>237</sup> Governor Leche ascended quickly from relative obscurity. He was Huey P. Long’s campaign manager in the Second Congressional District in 1930; he became secretary to Governor O.K. Allen; and by 1934 he was appointed to the Orleans Parish Court of Appeal. Sindler, *supra*, at 119. After Huey Long’s assassination in 1935, the Long political machine almost immediately broke apart. A split occurred in the Long machine, resulting in two major factions, each lead by a triumvirate of men. Harnett T. Kane, HUEY LONG’S LOUISIANA HAYRIDE: THE AMERICAN REHEARSAL FOR DICTATORSHIP: 1928-1940, 149 (Pelican Publishing Co. 1998); Sindler, *supra*, at 118; White, *supra*, at 269. The Reverend G.L.K. Smith, Earle J. Christenberry, and James Noe comprised the faction that held to Huey Long’s Share-Our-Wealth economics as well as his anti-New Deal, anti-Roosevelt policies. The second faction, led by Robert Maestri, Seymour Weiss, and Abe Shushan, was the more conservative faction, seeking to preserve the political machine above all else. Kane, *supra*, at 444. It was the latter faction that supported Leche for governor. James A. Noe had the chance to route Leche in his own run for governor, especially after O.K. Allen’s death. However, many of Noe’s initial supporters (especially G.L.K. Smith and Seymour Weiss) turned their backs on him in favor of Leche’s candidacy. Although Noe eventually made peace with these people and even secured a seat as a State senator in the election, there was resentment between himself and the others from 1936 forward. McManus, *supra*, at 27-33.

<sup>238</sup> A copy of Act 93 of 1936 is attached hereto as Appendix 34. The State Mineral Board is now officially known as the Louisiana State Mineral and Energy Board (“SMEB”) – a name change that occurred pursuant to Act 196 of 2009.

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unilaterally issue State mineral leases, whether those issuances were based on the State's best interests or the currying of political favor. Accordingly, with the backstops of Long/Allen/Noe cronyism gone and the State Mineral Board serving as a check on the Governor's leasing power, there is no compelling reason to examine the legality of post-1936 leases under the theories posited by Messrs. Cressionnie and Billiot and the "Dirty Deeds" stories.

### **B. Leases That Need No Examination**

There are several leases that initially appear to be related to the Win or Lose matter that do not merit any examination. Those leases and the reason that they are excluded from this examination are the subject of this subsection.

#### **1. Predating Leases**

Contrary to some of the allegations related to W.T. Burton, he had participated in mineral leasing with the State for some time prior to the emergence of the Long/Allen/Noe political machine. On October 15, 1920, W.T. Burton was awarded State Lease 42, which initially encompassed 2,271.0 acres. The lease still exists today, with 1,459.86 acres remaining held under the original lease. Because this lease substantially predates the ascendancy of Huey P. Long to a political office with any influence over the granting of mineral leases, it is excluded from this inquiry.

State Lease 195, which was acquired by M. Hession on January 3, 1928, is also excluded from this inquiry. This lease was granted by Governor Oramel H. Simpson a few months prior to the beginning of Huey P. Long's term as the Governor of Louisiana. The only interest linking this lease to the subject of this report is an overriding royalty interest to Win or Lose Corporation.<sup>239</sup> Because none of the activity related to State Lease 195 occurred during the

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<sup>239</sup> The date of this assignment of this overriding royalty interest is unknown. No record of the interest appears in the State's records, but this is not surprising, as overriding royalty interests are often private transactions that need

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public terms of any of the subject individuals (Long, Allen, or Noe), it is excluded from this inquiry.

### **2. Lapsed Leases**

The majority of the leases listed in Tables 4 and 5 have gone off of production and the acreage has been returned to commerce. Because these leases are no longer extant, it is not worthwhile to examine the legal options to cancel them – they no longer exist. Table 6 lists the leases from Tables 4 and 5 that have expired and are thus not examined in this report for possible cancellation.

**Table 6. List of Table 4 and Table 5 leases that have expired or been released in their entirety.**

<b>State Lease Number</b>	<b>Date of Final Termination</b>	<b>Reason for Termination</b>
315	Unknown	Unknown
318	April 14, 1975	Release
321	August 17, 1938	Term lapsed
322	Unknown	Unknown
326	October 22, 1938	Term lapsed
327	November 5, 1938	Term lapsed
330	November 26, 1938	Term lapsed
332	January 18, 1957	Release
336	Unknown	Unknown
337	Unknown	Unknown
343	March 7, 1939	Term lapsed
469	December 2, 1943	Release
495	January 17, 1993	Release
1329	July 17, 1953	Release

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not be reported to the State. The only information linking this lease to the Win or Lose Corporation is a reference to it in the documents on file with the State evidencing a transfer of that entity's successor's (*i.e.*, Independent Oil & Gas Co., Inc.) interests upon its dissolution.

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Of the leases that remain in existence today that are contained in Tables 4 and 5, many of those leases are mere fractions of their original size due to partial releases.<sup>240</sup> It is important to note, however, that although these leases are not examined in any detail in this report, under *State ex rel. Shell Oil Co., Inc. v. Register of State Land Office*,<sup>241</sup> because the leases are lapsed, the State likely could not undo their effects today. Further, even if the State wanted to challenge the holding of *State ex rel. Shell Oil Co.*, the same legal impediments to invalidating the extant leases would apply to the extinct leases, thus making the remainder of this report relevant to these lapsed leases as well. Table 7 lists the extant leases from Table 4 and 5 that remain in existence today to demonstrate the current sizes of those leases.

**Table 7. Extant Table 4 and Table 5 leases and their original and current sizes**

<b>State Lease Number</b>	<b>Original Size<sup>242</sup></b>	<b>Current Size<sup>243</sup></b>	<b>Percent of Original Size Left</b>
42	2271.00	1,459.86	64.28
309	500.00	500.00	100.00
334	40,000.00	3,021.02	7.55
335	500,000.00	12,553.00	2.51
340	250,000.00	75,640.00	30.26
341	1,000.00	1,000.00	100.00
344	35,000.00	498.06	1.42
494	300.00	300.00	100.00

**C. Leases Needing Examination – State Leases 309, 334, 335, 340, 341, and 344**

The only leases that today remain active and that were issued or assigned during O.K. Allen’s or James A. Noe’s terms as governor are State Leases 309, 334, 335, 340, 341, and 344.

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<sup>240</sup> Maps generated by the Louisiana Department of Natural Resources that depict the original size of the State leases contained in Table 7, as well as what remains active portions of those leases today are attached to this report as Appendix 35.

<sup>241</sup> 192 So. 519 (La. 1939).

<sup>242</sup> In acres.

<sup>243</sup> In acres.

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It is with a special eye to these leases that each of the following legal inquiries is undertaken. However, the legal conclusions as to these leases apply the same as to the lapsed leases.

### **V. Current Legal Theories**

There is no real legal or factual basis on which the State can claim a share of the lessees' royalties from the Win or Lose leases. Lessee's royalty shares, by their very nature, are that portion of the monies realized by mineral production that are retained by the lessee in exchange for the risks and expenses involved in mineral exploration and production.<sup>244</sup> Under the Louisiana law in force at the time that the subject leases were granted, the interest share of production to lessees was set at a maximum of 87.5%. The State had and has no claim, under general mineral law principles, to the lessee's share of mineral production. Thus, the following legal theories, while presented and analyzed here as they apply to these leases, are only viable if it can be proven: (1) that the State has been underpaid its share by the original lessees; or (2) that the leases at issue here were not issued illegally or were issued in the best interests of the State. Because the State received its legally-required share of 12.5% from the Win or Lose leases – no less than the same share was received from other winning bidders at the time – it is difficult, if not impossible, to say that the State did not enter into the subject leases in its best interests. As is demonstrated by the data in Table 8, this conclusion is supported by the descriptive statistics on royalty rates received by the State from mineral leases for the period from 1929 through 1941 (State Leases 219 – 509).<sup>245</sup>

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<sup>244</sup> WILLISTON ON CONTRACTS, *Assuming the risks*, § 70:181 (2013); *see also* La. R.S. 31:120, cmt.

<sup>245</sup> All of the raw data used as inputs for all of the analyses contained within this report was acquired from the public records held by the Louisiana Department of Natural Resources. Copies of the raw data sets used to undertake the various analyses in this report are attached hereto in Appendix 36.

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**Table 8. Descriptive statistics for the State’s royalty shares from State mineral leases for the years 1929 through 1941**

<b>Statistic</b>	<b>Royalty on Oil</b>	<b>Royalty on Gas</b>
Number of Leases <sup>246</sup>	285	285
Minimum	12.50	12.50
Maximum	25.50	16.67
Range	13.00	4.17
Median	12.50	12.50
Arithmetic Mean	13.03	12.82
Standard Deviation	1.516	1.058

It is important to note that, although the oil royalty data used to create Table 8 demonstrate an average royalty rate of 13.03% for the period examined, this rate is based on slightly skewed data. Using the Grubbs’ test to identify outliers, one outlier was identified in this dataset: State Lease 413 (with a royalty rate of 25.0%).<sup>247</sup> The result of identifying this outlier within the dataset is that the median royalty rate is likely representative of the typical royalty rate during this time period: 12.5%. The same cannot be said of the gas royalty rate. The Grubbs’ test for this variable identified no outliers,<sup>248</sup> thus indicating that the average of 12.82% is typical of the gas royalty rate received by the State during the period examined (which is not substantially higher than the median rate of 12.5%).

As to the State’s interests in the subject leases, the analysis that follows has little practical application to “undoing” the Win or Lose leases. The reason, as stated *supra* and *infra*, is that, because the State received what it was supposed to receive from these leases – a 12.5% share of its minerals produced – any legal theories to invalidate these leases are useless in that employing

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<sup>246</sup> Although there are actually 290 leases between State Lease numbers 219 and 509, five of those leases either did not report royalty amounts in an accessible manner or the royalty amounts were graduated rather than representing constant amounts. These five leases were excluded from this analysis. None of the excluded leases were Win or Lose leases.

<sup>247</sup> n=285, Z=3.709, p=0.05.

<sup>248</sup> n=285, Z=3.709, p=0.05.

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such theories would not result in any windfall for the State from monies that it should have received, but did not. Regardless of whether the legal theories reviewed herein are valid, the State still would have received its mandatory share of 12.5%. As is discussed more fully, *infra*, it is doubtful whether it would be in the State's best interests to "undo" any of the Win or Lose leases today. The following analysis may, perhaps, be used by heirs or descendants of the lessees to argue that certain of their interests vis-à-vis each other were not properly granted, but such would constitute private causes of action in which the State cannot become involved.

### **A. Malfeasance in Office**

The current version of the law prohibiting malfeasance in office, La. R.S. 14:134,<sup>249</sup> is a manifestation of two former statutes. These statutes, which were the laws in force in the 1930s, are: Acts 1912, No. 254 (general malfeasance in office) and R.S. 1870, §872 (failure of officer to perform duty).<sup>250</sup>

Acts 1912, No. 254 §1 is substantially similar to the current law in that it prohibits a civil officer from: "willfully fail[ing], refus[ing], or neglect[ing] to perform an official duty required of him....," from "perfor[m]ing any such duty in an unlawful manner," or permitting any officer under his authority to do the same.<sup>251</sup> The former statute is stricter than the current version because it contains the phrase "required of him, personally, by law" rather than "any duty lawfully required of him." According to the comments to La. R.S. 14:134, the current phrasing

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<sup>249</sup> La. R.S. 14:134 was first enacted in its modern form in 1980.

<sup>250</sup> Although the official comments to La. R.S. 14:134 note R.S. 1870, §872 as a source for the current law, a review of that section reveals that that former law is essentially a penal provision that would accompany a mandamus action under the current La. C.C.P. Art. 3861, *et seq.*, for the failure of a public official to undertake an action that he or she is required to do under the law. All of the Win or Lose-related activities (*i.e.*, leasing, etc.) would not qualify as mandatory duties. See *e.g.*, *Allen v. St. Tammany Parish Police Jury*, 96-0938 (La.App. 1 Cir. 2/14/97), 690 So.2d 150, 153 ("Mandamus will not lie in matters in which discretion and evaluation of evidence must be exercised."). Thus, mandamus (and presumably an action under R.S. 1870, §872) would not lie against any party to the Win or Lose matter.

<sup>251</sup> Acts 1912, No. 254 §1.



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includes the neglect or wrongful performance of any properly required duty, which would include administrative and departmental rules.

The elements that must be proven for a violation of the 1912 law to be found would therefore be: (1) that the actor be a civil officer or an officer under a civil officer's authority as contemplated by the statute; (2) that the actor had an official duty required of him, personally, by law; and, (3) that the actor either neglected to perform such a duty or performed such a duty in an unlawful manner.<sup>252</sup> The remedy that existed under this law in the 1930s was that the officer,

shall be deemed guilty of a misdemeanor in office, and on conviction thereof, shall be punished by being condemned to pay a fine not to exceed five hundred dollars, or to suffer imprisonment, not exceeding six months, or both, at the discretion of the court.<sup>253</sup>

Thus, a review of the malfeasance in office laws of the time reveals that such a law would not apply to O.K. Allen's or James A. Noe's granting of the Win or Lose leases, as there is no proof that they either neglected to perform such a duty or performed such a duty in an unlawful manner. The penalty for violating this law is as against the public officer.<sup>254</sup> If proof existed of this activity, the only remedy for the State would be a conviction of one or more governors who died decades ago – an impossibility. The best that the State could hope for if it chose to use this theory to attack the Win or Lose leases is that the acts of the long-deceased governors could be found to be unlawful, thus nullifying the leases. As is noted throughout this report, no evidence of such unlawful action has been found. Proving malfeasance in office is thus highly unlikely.

### **B. Ethical Violations – Ethics Laws in 1936**

It is fairly certain that the mineral leasing actions of O.K. Allen and James A. Noe during their terms as governor from 1934 through 1936 would violate current ethics statutes if they had

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<sup>252</sup> *Id.*

<sup>253</sup> *Id.*

<sup>254</sup> Acts 1912, No. 254 §1.

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happened now. A simple example of this current reality is State Lease 340. Governor Noe's grant of State Lease 340 to W.T. Burton, who subsequently assigned it to the Win or Lose Corporation on February 19, 1936,<sup>255</sup> an entity in which the then-Governor had a financial interest, clearly would not pass muster under today's ethics laws. In particular, La. R.S. 42:1112 states that:

A. No public servant except as provided in R.S. 42:1120, shall participate in a transaction in which he has a personal substantial economic interest of which he may be reasonably expected to know involving the governmental entity.

B. No public servant, except as provided in R.S. 42:1120, shall participate in a transaction involving the governmental entity in which, to his actual knowledge, any of the following persons has a substantial economic interest:

(1) any member of his immediate family

(2) Any person in which he has a substantial economic interest of which he may reasonably be expected to know.

In addition, La. R.S. 42:1116(C), provides that:

No regulatory employee shall participate in any way in the sale of goods or services to a person regulated by his public agency, or to any officer, director, agent, or employee of such person, if a member of the immediate family of the regulatory employee, or any business enterprise in which such regulatory employee or member of his immediate family owns at least twenty-five percent, receives or will receive a thing of economic value by virtue of the sale.

In the interest of completeness, we analyze the actions of Governor Noe under the current law. The case of *In re J.B. Marceaux* is instructive in this regard.<sup>256</sup> In this case, the Louisiana First Circuit Court of Appeal affirmed the Board of Ethics for Public Employees' order finding that a public employee had violated two provisions of the Code of Governmental Ethics.<sup>257</sup> The employee violated sections 1111(C)(2)(d) and 1112(B)(3) of the Code of Governmental Ethics by serving on the Hospital Board for Terrebonne Parish while receiving a salary from Bayou

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<sup>255</sup> Assignment of State Lease 340 to Win or Lose Corporation by W.T. Burton on February 19, 1936.

<sup>256</sup> 96-1215 (La.App. 1 Cir. 1997), 689 So.2d 670.

<sup>257</sup> *Id.* at 672.

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Oaks Psychiatric hospital and the Board of Ethics ordered him to discontinue one of the two conflicting activities. This case is relevant to the Win or Lose situation for the following reasons.

First, the Board and the First Circuit broadly interpreted the provisions of the Code of Governmental Ethics. Although Marceaux was employed by Bayou Oaks, he had no managerial authority and was never asked to use his position on the Hospital Board to influence contract awards.<sup>258</sup> Nevertheless, La. R.S. 42:1112(B)(3) prohibits a public servant from participating in a transaction when he or she has actual knowledge that his or her employer has a substantial economic interest in that transaction.<sup>259</sup> The “substantial economic interest” in this case involved the Hospital Board’s approval of a subleasing arrangement with Bayou Oaks.<sup>260</sup> Similarly, the bulk of the evidence in the Win or Lose case seems to indicate that Governor Noe could have reasonably been expected to know that he had substantial economic interests in granting the leases to W.T. Burton. If the current ethics laws were applicable to the leases in question, then the transactions would likely have been in violation of La. R.S. 42:1112(B)(2).

Second, the court rejected Marceaux’s argument that the charges related to the Bayou Oaks lease had prescribed.<sup>261</sup> The court based its decision on the grounds that since the appellant kept receiving payments from his employers while serving on the Hospital Board, each additional payment constituted an ongoing violation of the law and thus prescription had not tolled when the charges were filed.<sup>262</sup> Like the court in *In re Marceaux*, the State, if the current ethics laws applied to the Win or Lose situation, could employ a similar line of reasoning regarding prescription since the continued payment of royalties to the three governors’ heirs constitutes an ongoing violation, and prescription has not yet begun. Furthermore, La. C.C. Art.

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<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 673; *see also* La. R.S. 42:1112(B)(3).

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 673.

<sup>262</sup> *Id.*

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2032 states that an “action for annulment of an absolutely null contract does not prescribe.” Finally, under La. Const. Art. XII, Sec. 13, liberative prescription does not run against the State. Thus, had the ethics laws that were enacted in the 1960s existed in the 1930s, there is little doubt that an action would continue to lie as against Governors Allen and Noe for the letting of the Win or Lose leases. However, because there were no prohibitions to this activity in the 1930s, neither can it be said that the governors acted unethically (from a legal, not a moral, perspective) nor that they created absolutely null contracts by knowing that they were likely to reap a benefit from the leases. Thus, although the State has several legal theories upon which to base an action against Governors Allen and Noe today and to ensure that those actions have not prescribed, those laws cannot be applied retroactively.<sup>263</sup> Further, as with the scenario in which the State may, had certain matters of proof and illegality existed, be able to seek a conviction of O.K. Allen or James A. Noe, were they alive, they are neither alive nor would the remedy for such suits result in a cancellation of leases or a return of the lessees’ portion of the royalties to the State. The remedy for these violations is merely as against the violator.

Although Governors Allen and Noe almost certainly would have violated these statutory provisions prohibiting unethical behavior from public officials if they had been the law in force at the time that the Win or Lose leases were granted, Louisiana did not have a governmental ethics code until the passage of Act 110 in 1964. Thus, the subject leases were issued during a time when no such controls existed on the actions of government officials. In the absence of such prohibitions, even if the activities would be illegal today, under the law of the time, the letting of mineral leases to someone who immediately assigned an interest in those leases to an

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<sup>263</sup> See *St. Paul Fire & Marine Ins. Co. v. Smith*, 609 So.2d 809, 816 (La. 1992).

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entity in which the grantor had a private interest was not prohibited. The laws of the 1960s cannot be applied retroactively to these actions.<sup>264</sup>

### **C. Bid Collusion**

Certain allegations have been made that the letting of the Win or Lose leases in the 1930s constituted unlawful bid collusion. Collusive bidding is defined as the illegal attempt by conspiring bidders to circumvent rules and laws drawn to ensure free and competitive bidding.<sup>265</sup> The general idea behind these allegations is that the letting of the Win or Lose leases in such a manner that ultimately benefited the Win and Lose Corporation constituted bid collusion as between Allen and Noe and the lessees/assignees of these leases.

In Louisiana, bid collusion is prohibited under the Louisiana Antitrust Law found at La. R.S. 51:121, *et seq.* The history of La. R.S. 51:122 demonstrates that the Legislature's intent with this law was to promote free competition and to protect trade and commerce against unlawful restraints. Although La. R.S. 51:121, *et seq.*, in its current iteration, is a law of recent vintage,<sup>266</sup> we note that contemporaneously with the adoption of the Sherman Antitrust Act, 15 U.S.C. §§ 1, *et seq.* ("Sherman Act"), the Louisiana Legislature passed Act 86 of 1890, containing a provision similar to that found in the Sherman Act to the effect that every contract or combination in restraint of trade was declared to be illegal.<sup>267</sup>

In 1892 the Legislature enacted Act 90, thereby adding new sections to Act 86 of 1890. Particularly, Act 90 prohibited the formation of trusts and the entering into agreements by individuals, firms, corporations, or other entities in order to influence trade in any manner as to

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<sup>264</sup> *Id.*

<sup>265</sup> See The Law Dictionary, "What is collusive bidding?," located online at: <http://thelawdictionary.org/collusive-bidding/> (last accessed Aug. 11, 2013).

<sup>266</sup> It was amended to its present form in 2003.

<sup>267</sup> Act 86 of 1890 reads, in relevant part, as follows:

...every contract, combination in the form of trust, or conspiracy, in restraint of trade or commerce to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this State is hereby declared illegal.

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affect prices. The Act also provided for the revocation of the charters of corporations violating the provisions of this Act and prohibited foreign corporations that violated the Act from doing business in this State. Additionally, Act 90, Section 7 made explicit that “any contract or agreement in violation of the provisions of this Act, shall be absolutely void.”

Following the same principle, Act 11 of the Extraordinary Legislative Session of 1915, declared illegal, “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in the State of Louisiana.”<sup>268</sup> In addition, Act 11 established the penalty for violators to five thousand dollars, or imprisonment with or without hard labor, not exceeding three years; also, the Act provided general procedure guidelines to prosecute the violators.

Act 11 of 1915 is particularly relevant to this analysis because it would control any combinations, conspiracies, or monopolies that presumably were in violation of the antitrust law in the 1930s. Since 1915, the antitrust laws in Louisiana remained unchanged until 2003, when the Legislature enacted Act 888, thereby amending and reenacting La. R.S. 51:122.<sup>269</sup>

Two elements must be established to prove that bid collusion is present under Act 11 of 1915: (1) the existence of a contract, combination, or conspiracy; and, (2) the restraint of trade or commerce. Note that the reference to “restraint of trade” includes only contracts, combinations, or conspiracies that are unreasonable restraints of trade.<sup>270</sup> Because proving concerted actions is essential to establishing a violation of Act 11, vague allegations of conspiracy or collusion will

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<sup>268</sup> In *State v. McClellan*, 98 So. 748 (La. 1923), the Louisiana Supreme Court held Act 90 of 1892 (and thus Act 86 of 1890) to be superseded by Act 11, thus making Act 11 the only law applicable to the current matter.

<sup>269</sup> La. R.S. 51:122 currently reads, in relevant part, as follows:

A. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce in this state is illegal.

<sup>270</sup> See *Wolf & Co. v. Orleans Lumber Co.*, 149 So. 322, 324 (La. Ct. App. 1933).

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be vulnerable to dismissal.<sup>271</sup> Thus, the complaint must describe the nature of the alleged conspiracy and that the actions of the co-conspirators resulted in an unreasonable restraint to commerce. Circumstantial evidence has been determined to be admissible in proving an antitrust violation.<sup>272</sup> If bid collusion had, in fact, taken place in the Win or Lose matter, then the contract involving such collusion would be null and void.<sup>273</sup> Based upon a review of the testimony set forth in *U.S. v. Noe*, there is little question that there was a “combination” of individuals in the Win or Lose matter that plotted to obtain mineral leases from the State.<sup>274</sup> Based upon the available evidence, however, it is not possible to say that any of the actions of the subjects of this report amounted to a “restraint of trade” under Act 11 of 1915. Speaking to the question of whether certain activity constitutes a restraint of trade, the Louisiana Supreme Court has held that:

The test of the illegality of a combination or an attempt to create a monopoly is not what the combination or attempted monopoly has accomplished, but what may be accomplished; not what has been done, but what may be done once the participants get in power to accomplish their purpose. If the natural tendency or probable effect of the combination or monopoly is the restraint of trade by stifling competition or to discourage enterprise and industry, the combination or monopoly is deemed to be detrimental to the public welfare and falls within the teeth of the law.<sup>275</sup>

Thus, the mere fact that the Win or Lose transactions were a result of collusion or concerted action by the subjects of this report is not enough to constitute a “restraint of trade,” nor is the fact that such actions may be distasteful by modern moral standards. The Court requires not only collusion, but also the creation of a scheme by which competition is stifled. It simply cannot be said that the Win or Lose leases led to any stifling of the exploration for or

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<sup>271</sup> See *J.W. Rombach, Inc. v. Parish of Jefferson*, 95-829 (La. App. 5 Cir. 2/14/96), 670 So.2d 1305. To this point, no Louisiana cases could be identified from the period of the 1930s. Thus, we rely on more recent cases to support this proposition.

<sup>272</sup> *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996 (3<sup>rd</sup> Cir. 1994).

<sup>273</sup> See, La. Atty. Gen. Op. No. 80-416, citing *Coleman v. Bossier City*, 305 So.2d 444 (1974).

<sup>274</sup> See generally Trial Transcript, *United States v. Noe*, Docket No. 20,070 (E.D. La.).

<sup>275</sup> *Tooke & Reynolds v. Bastrop Ice & Storage Co.*, 135 So. 239, 243 (La. 1931). See also *Wolf & Co.*, *supra*.

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production of oil and gas in Louisiana. Indeed, that industry boomed several times after the Win or Lose transactions had been consummated.<sup>276</sup> Therefore, bid collusion, as it has been interpreted and applied by the Louisiana courts at the time of the Win or Lose activity is not applicable to this matter as there was no restraint of trade involved.

Further, because the available evidence indicates that all of the applicable laws at the time were followed with regard to the letting of these leases, it cannot be said that an unreasonable restraint of trade occurred. Certainly, other parties were shut out of operating mineral activities on the leased property, but such was accomplished pursuant to a legislatively-created public bid process (*i.e.*, Act 30 of 1915). Thus, to the extent that the leases herein can be said to restrain trade by their nature (*i.e.*, restricting the area to competitive mineral activities), then such is legally-sanctioned restraint, which cannot be unlawful.<sup>277</sup> With the foregoing said, however, in the interest of completeness, because bid collusion is one of the few laws that can rely on circumstantial evidence as a basis for upsetting contracts, a further examination of the viability of such an action is here undertaken.<sup>278</sup>

Even though the Louisiana antitrust law does not specify a prescriptive period, it has been determined that the prescriptive period for monopoly and antitrust claims is the same as for tort actions, or one year.<sup>279</sup> In *State ex rel. Ieyoub v. Bordens, Inc.*,<sup>280</sup> the State filed a *parens patriae*

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<sup>276</sup> See *e.g.*, Robert Gramling and William R. Freudenburg, *A Closer Look at "Local Control": Communities, Commodities, and the Collapse of the Coast*, 55(4) RURAL SOCIOLOGY 541, 543-546 (1990) (discussing the 1970s-1980s oil boom in Louisiana and the historic rise in oil-related activities and economies in Louisiana from the 1940s through the 1980s); Boris Morozov, *Budgeting Practices and Experiences in Louisiana: From the Traditional 1990s to the Dramatic 2000s*, J. PUB. BUDGETING, ACCOUNTING & FIN. MANAGEMENT 25(2): 243, 244-245 (2013) (noting a post-Katrina/Rita oil boom in Louisiana).

<sup>277</sup> In this regard, the Louisiana Supreme Court has noted that Act 11 of 1915 was not intended to restrain lawful activity that acts as a restraint to trade. *State v. American Sugar Refining Co.*, 71 So. 137, 144-145 (La. 1916).

<sup>278</sup> This examination assumes that the circumstances that a lease was awarded by a governor (Allen or Noe) to a business partner (Burton) who immediately reassigned the lease to a joint venture of the two (Win or Lose) would constitute sufficient circumstantial evidence to support a bid collusion cause of action absent any other mitigating problems to proving those circumstances (of which there are several in this situation that are reviewed in Part VI).

<sup>279</sup> *Lee v. City of Shreveport*, 46,146 (La.App. 2 Cir. 3/2/11), 58 So.3d 601, 605-06 writ denied, 2011-0607 La. 4/29/11, 62 So.3d 114. In *Delta Theaters, Inc. v. Paramount Pictures, Inc.*, 158 F.Supp. 644 (E.D.La.1958), appeal



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petition against a milk supplier pursuant to the antimonopoly statute, alleging bid-rigging in connection with school milk contracts. The petition alleged a bid-rigging scheme that affected the ability of the schools to receive fair, competitive bids and pay competitive prices on milk sold to Louisiana schools. The petition claimed that Borden and the other co-conspirators discussed the submission of bids, designated which conspirator was to be the low bidder, discussed and agreed upon prices to be bid, and submitted intentionally high bids. The court determined that the one year prescriptive period of the antitrust law, La. R.S. 51:121, *et seq.*, applied to this case.<sup>281</sup> The one year tort period runs from the time the plaintiff acquired sufficient knowledge of the offense to realize there was an injury.<sup>282</sup>

Because the alleged collusion resulted in the issuance of potentially null and void State leases still in operation, we must explore whether such an action has set in motion a “continuous tort” (on which prescription does not begin until the conduct causing the damages is abated).<sup>283</sup> However, in order for a case to qualify as a continuing tort, the conduct causing the damage must be continuous in nature, not the damages.<sup>284</sup> In this situation, the conduct occurred in the 1930s.

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*dismissed*, 259 F.2d 563, the court stated that actions under federal antitrust laws for damages were “tort” actions within purview of former Article 3537 of the 1870 Civil Code, requiring such actions to be brought within one year. *See also State ex rel. Ieyoub v. Bordens, Inc.*, 95-2655 (La. App. 4 Cir. 11/27/96), 684 So.2d 1024, *writ denied*, 97-0339 (La. 3/14/97), 690 So.2d 42. Similarly, the Second Circuit has concluded that “[w]hether categorized as a monopoly [sanctioned by the antitrust law] or a general delictual act, both classifications lend themselves to a one-year prescriptive period.” *Lee v. City of Shreveport, supra*.

<sup>280</sup> 95-2655 (La. App. 4 Cir. 11/27/96), 684 So.2d 1024, *writ denied*, 97-0339 (La. 3/14/97), 690 So.2d 42.

<sup>281</sup> Citing *Loew’s Incorporated v. Don George, Inc.*, 110 So.2d 553 (La. 1959); *Delaughter v. Borden Company*, 364 F.2d 624 (5<sup>th</sup> Cir. 1966) and *Diliberto v. Continental Oil Company*, 215 F.Supp. 863 (E.D.La. 1963). Borden argued that prescription runs where the State asserts claims in its *parens patriae* capacity and here the one year prescriptive period had run. The Attorney General countered that prescription does not run against the State based on La. Const. Art. XII, Sec. 13, which declares that “prescription shall not run against the state in any civil matter unless otherwise provided in the constitution or expressly by law.” The court reasoned that a *parens patriae* action brought by the State on behalf of its citizens has elements of private and public enforcement. Even in federal cases, the passage of the four year period under federal law is used to bar actions by the states. *See State of Texas v. Allan Construction Company*, 851 F.2d 1526 (5<sup>th</sup> Cir. 1988).

<sup>282</sup> *Delaughter, supra*, at 624.

<sup>283</sup> *South Central Bell Telephone v. Texaco, Inc.*, 418 So.2d 531, 533 (La. 1982). *See also Benton, Benton & Benton v. Louisiana Pub. Facilities Auth.*, 95-1367 (La. App. 1 Cir. 4/4/96), 672 So.2d 720, 723, *writ denied*, 96-1445 (La. 9/13/96), 679 So.2d 110.

<sup>284</sup> *Lee v. City of Shreveport, supra*.

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Thus, the time within which to bring an action for a violation of the antitrust laws (*i.e.*, bid collusion) has long since passed. Thus, even if Act 11 could be used to invalidate the Win or Lose leases if they were found to result from activity prohibited by that Act, the jurisprudence clearly demonstrates that any such action has long ago prescribed. However, it does not appear that the activity of those involved in this inquiry even rises to the level of bid collusion sufficient to trigger the application of Act 11 to this matter.

### **D. Fraud**

There is no specific provision in the Criminal Code that covers a “crime of fraud,” *per se*. In the absence of an explicit crime of fraud or a criminal definition of fraud, we here look to the relevant civil law at the time. In the current Civil Code, fraud is defined as,

a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other.<sup>285</sup>

This article did not come into effect until revisions to the Civil Code in 1984. However, the Revision Comments to La. C.C. Art. 1953 state that, “[t]his Article is new. It does not change the law, however. It restates the definition found in C.C. Art. 1847(6)(1870).”<sup>286</sup> Thus, the legal definition in place at the times relevant to this research would have been essentially the same as the definition found in the current La. C.C. Art. 1953.

Because there was no “crime of fraud” in the 1930s, it is somewhat irrelevant to discuss the elements of such crime,<sup>287</sup> but parsing out the civil elements of fraud, a fraudulent party would have to be found to have made a misrepresentation or suppressed the truth in an attempt to gain an unjust advantage for one party or to cause loss or inconvenience to another. As has been

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<sup>285</sup> La. C.C. Art. 1953.

<sup>286</sup> La. C.C. Art. 1953, cmt. a.

<sup>287</sup> It is important to note in this regard that several of the other legal theories reviewed herein were likely surrogates for an actual crime of “fraud” in the 1930s.

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noted throughout this report, because there is no indication that the State received anything less than its statutorily-guaranteed royalty share of 12.5% from the Win or Lose leases, it is unlikely that the “loss or inconvenience” can be proven as against the State’s interests. Such an allegation would be required to rest on the speculation that the State would have received a more advantageous bid and lease terms had the Burton/Noe bids been rejected. That is not possible to now know.

Whether the Win or Lose leases satisfy the other component of fraud (*i.e.*, “gain an unjust advantage for one party”), again, this requires evidence that is not present. Did Burton/Noe obtain an advantage with these leases? Clearly they did. However, was the advantage unjust? They did not, as is shown herein, break any laws at the time (or there is no evidence of such activity) to obtain this advantage. Thus, it is hard to say that the advantage was unjust. Also necessary to succeed on this theory, it would have to be proven that Burton/Noe made “misrepresentation[s] or...sup[p]ress[ed]...the truth” to obtain the advantage. Although it is possible to insinuate or assume such misrepresentations or suppressions, no clear evidence of such activity has been identified.

With respect to these requirements, again, the lack of proof is a virtual bar to utilizing a fraud theory in either a criminal or a civil sense as against any of the Win or Lose leases. It is possible that receiving the subject mineral leases by fraud could invalidate them under a theory that such activity was contrary to the morals of the 1930s (*contra bonos mores*) or due to the fact that fraud is a vice of consent.<sup>288</sup> However, under either theory, proof of Win or Lose receiving

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<sup>288</sup> La. C.C. Art. 1948. This is a problematic prospect, as morality and values have adapted over time, meaning that making morality judgment calls on what was and what was not acceptable in the 1930s largely amounts to speculation at this late date. Further, in many ways, the idea that laws exist to designate a distinction between morality and immorality complicates matters with regard to the Win or Lose situation. Jacques P. Theroux, *ETHICS: THEORY AND PRACTICE*, 8-10 (Glencoe 1977). In this regard, have the laws already set the bounds of morality? If that is the case, then, although distasteful by modern standards, the actions of those related to the Win or Lose matter may have been deemed to be moral at the time by virtue of the Legislature not barring such activity. The changing

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interests in the leases by fraud is necessary and such proof has not been identified sufficient to support a legal cause of action.

### **E. Were there Violations of the Bid Process in the 1930s with the Win or Lose Leases?**

#### **1. What were the steps and were they followed?**

Madden has characterized the pre-1936 law related to mineral leasing from the State thusly:

Legislation existing prior to the passage of Act 93 of 1936..., governing the mineral leasing of state-owned lands and navigable water beds, was confusing, left much to conjecture, and appeared to vest too much authority in the Governor.<sup>289</sup>

Nonetheless, it is this pre-1936 mineral leasing law that governs the leases acquired by the Win or Lose Corporation that are the subject of this report.

A series of legislative acts embodied the statutory standards governing the issuance of oil and gas leases in 1934 through 1936. Before the passage of Acts 1928, No. 9 (Extra Session), the Governor of Louisiana was unilaterally authorized to lease State lands for oil and gas

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of social mores over time was noted by Dr. Alecia Long in the “Dirty Deeds” series when she noted that, “it was simply assumed that in order to get deals done a certain amount of graft would be taken off the top of any particular deal.” *Lee Zurik Investigation: ‘Dirty Deeds’ cost Louisiana hundreds of millions* (WVUE Fox 8 television broadcast, 2012). Indeed, a recent publication has discussed the differing moral standards of the 1920s and 1930s from other American periods, making any morality determination with regard to the Win or Lose matter tenuous and complex at best. *See generally* Melissa E. Weinbrenner, *Movies, Model Ts, and Morality: The Impact of Technology on Standards of Behavior in the Early Twentieth Century*, 44(3) J. OF POPULAR CULTURE, 647 (2011). Despite the above statements, the possibility of getting at objective measures of morality, at least using existing methodologies, is not possible. Gabriel Abend, *Two Main Problems in the Sociology of Morality*, 37 THEOR. SOC. 87 (2008). Thus, it is difficult to conceive of a scenario in which judgment calls regarding whether the actions of the Win or Lose-related individuals were moral at the time can be reasonably or objectively put to a court. In fact, this reality harkens to the admonition of the Louisiana Supreme Court in the *McGuigin v. Ochiglevich* case, *infra*, that courts should not dabble in divining the morality of certain activities. In addition to the inherent difficulties in divining moral judgments from more than seven decades ago, the data on public opinion from that period (which is a presumptively reasonable surrogate for morality if the correct questions are asked) has internal problems and has been little analyzed to date. Adam J. Berinsky, *American Public Opinion in the 1930s and 1940s: The Analysis of Quota-Controlled Sample Survey Data*, 70(4) PUBLIC OPINION QUART. 499 (2006). Thus, making analyses of the Win or Lose activities by comparison to other data impossible at this time.

<sup>289</sup> John L. Madden, FEDERAL AND STATE LANDS IN LOUISIANA, 415 (Claitors 1973).

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development and enjoyed virtually complete discretion in providing for the terms and conditions of the leases.<sup>290</sup>

With a few minor exceptions, the controlling law for mineral leasing at the time of the letting of the Win or Lose leases was governed by Acts 1915, No. 30 (“Act 30”). In pertinent part, that law stated that, upon receiving an application for a mineral lease on State land:

[t]he Governor may cause to be published in the official journal of the State and in the official journal of the parish wherein such land is located and advertisement to be published for a period of not less than fifteen days, setting forth therein a description of the land to be leased by the State, the time when bids therefore will be received, a short summary of the terms and conditions of the lease or leases to be executed, and, in his discretion, the royalty to be demanded should he deem it to the interests of the State to call for bids on the basis of a royalty fixed by him....<sup>291</sup>

This law was amended by Acts 1926, No. 315 (“Act 315”), but the amendment resulted in only minor changes. This latter law stated that, after the fifteen days noted in Act 30, the governor was vested with full authority to:

execute any lease or leases so granted, to the highest bidders therefore, under such terms and conditions as to him seem proper; provided that the minimum royalties to be stipulated in such leases to be paid by the State shall be one-eighth of all the oil and gas produced and saved from the property leased...<sup>292</sup>

In 1928, the Register of State Lands acquired the authority to adjust, settle, and determine, by agreement with the lessee, and with the approval of the governor, all matters arising from the interpretation of oil and gas leases granted by the State of Louisiana.<sup>293</sup> The 1928 Act was limited in scope and did not otherwise change any of the standards prescribed in

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<sup>290</sup> See Act No. 30 of 1915; Act No. 315 of 1926, and Act No. 9 of the 1928 (Extra Session). See also Letter from Gaston L. Porterie, Attorney General, to Oscar K. Allen, Governor, dated Jan. 23, 1936 (attached hereto in Appendix 24) (opining on the broad discretion of the governor to grant mineral leases prior to the creation of the State Mineral Board). See also William O. Bonin, *Public Mineral Leasing in Louisiana*, 27 TUL. L. REV. 246, 246-247 (1953).

<sup>291</sup> See Act 30, Sec. 3.

<sup>292</sup> See Act 315, Sec. 4.

<sup>293</sup> See Acts 1928, No. 9 (Extra Session).

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the 1915 and 1926 acts, since it only amended section 1 of Act 30.<sup>294</sup> Thus, there were few standards imposed on the unilateral authority of Governors Allen and Noe when they executed the subject mineral leases in 1934 through 1936. These standards, or the lack thereof, remained in force until the Legislature changed the law in 1936 and created the Louisiana State Mineral Board.<sup>295</sup> This activity occurred subsequent to the issuance of the subject leases.

Based upon the law in force at the time, the governor, under Act 30, had discretion to advertise mineral leases (evident by the presence of the term “may” in Section 3 of that Act). Thus, because such advertisements were not mandatory, it is irrelevant whether the Win or Lose leases were advertised. Further, Act 315 set the minimum royalty for State leases at 12.5%, but none of these Acts, nor Act 30, required the payment of a bonus or rental for mineral leases on State property. Accordingly, the 12.5% royalty interest reserved to the State in the Win or Lose leases was acceptable as consistent with the law in force at the time. Finally, Act 9 of the 1928 Extraordinary Session conferred on the State Land Office only the authority to modify mineral leases when questions of interpretation arose. This Act did not curtail the governor’s plenary authority to grant leases on terms that he deemed, in his discretion, proper. Because of the lack of standards for the issuance of mineral leases that existed at the time that the Win or Lose leases occurred, there is no indication that these leases were issued in contravention of the appropriate legal requirements at the time.

Another matter to consider in tandem with the granting of the leases is whether the assignments of these leases to third parties – the manner in which the Win or Lose Corporation obtained its interests in the subject leases – were accomplished in a manner consistent with the

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<sup>294</sup> *Id.*; see also Act 30; Act 315. All of these acts are attached hereto as Appendix 37.

<sup>295</sup> Acts 1936, No. 93.

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law. The current law related to the assignment or transfer of a State mineral lease is found in La.

R.S. 30:128, which provides:

A. No transfer or assignment in relation to any lease of minerals or mineral rights owned by the state shall be valid unless approved by the State Mineral and Energy Board. The mineral board may charge a fee of one hundred dollars to cover the cost of preparing and docketing transfers or assignments of leases of mineral or mineral rights. All parties to transfers or assignments in relation to any lease of mineral or mineral rights from the state shall be registered prospective leaseholders with the office of mineral resources. Transfers or assignments shall not be granted to prospective leaseholders that are not currently registered with the office of mineral resources.

B. (1) Failure to obtain approval of the board of any transfer or assignment of a lease within sixty days of execution of the transfer or assignment shall subject the transferor or assignor to a civil penalty of one hundred dollars per day beginning on the sixty-first day following the execution of the transfer or assignment. The penalty shall continue to accrue on a daily basis until the date on which the transfer or assignment is received by the office of mineral resources for submission to the board for approval or to a maximum amount of one thousand dollars.

(2) The penalties shall be paid into the Mineral and Energy Operation Fund on behalf of the board. The board may waive all or any part of the penalties provided in this Section.

C. A transfer for purposes of this Section shall not be deemed to occur by the granting of a mortgage in, collateral assignment of production from, or other security interest in a mineral lease or sublease or the transfer of an overriding royalty interest, production, payment, net profits interest, or similar interest in a mineral lease or sublease.

This provision is comprehensive in setting forth the rules related to assignments and transfers of State mineral leases and the penalties for violating such rules. However, this law is of fairly recent vintage. The original version of this provision was enacted in 1993. Its predecessor was a bit more straightforward. This provision, included in the original organic legislation for the State Mineral Board in 1936, read as follows:

No transfer or assignment in relation to any such lease shall be valid unless and until approved by the State Mineral Board.<sup>296</sup>

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<sup>296</sup> Acts 1936, No. 93, Sec. 8. *See also* La. Atty. Gen. Op. 1940-42, pp. 2089-2090.

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Prior to the creation of the State Mineral Board and the inclusion of the above language in that organic legislation, there was no legislation in Louisiana that controlled or restricted the assignment of State mineral leases.<sup>297</sup> Accordingly, in the absence of any law controlling or restricting such transfers or assignments, it cannot be said that those assignments were prohibited and there are no obligations imposed upon the governor or any instrumentality of the State to adhere to any such nonexistent rules. It is probable that the governor or other State signatory to such assignments was bound by a general fiduciary duty to the State in undertaking such assignments. However, as is set forth more fully *supra* and *infra*, because the State has always received at least its minimum legal royalty share from the subject leases, in hindsight, it is not possible to say that any assignments of these leases constituted a derogation of any fiduciary duty to the State. Further, in the absence of law to the contrary, as long as such assignments or transfers did not adversely impact the State's 12.5% royalty share, the activities were, until the passage of Acts 1936, No. 93, agreements among private parties. There was no requirement that the State approve said assignments nor even be notified of the assignments. This may be the reason for the lack of some assignments in the State's records (*e.g.*, the assignment of the Win or Lose interest in State Lease 195).<sup>298</sup>

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<sup>297</sup> A review of the law in force at the time of the Win or Lose leases is indicative of this reality. See Acts 1915, No. 30; Acts 1926, No. 315; Acts 1924, No. 315; and Acts 1928, No. 9 (Extra Session), none of which contain any language related to mineral lease assignments. Indeed, Madden echoes this lack of a requirement prior to 1936. Madden, *supra*, at 423. Further, Madden also notes of the 1936 law that,

it is recognized that a contention could be made, whether supportable or not in law, that a transfer or assignment, in whole or in part, of a lease, duly executed by the parties, is a firm contract, fait accompli in itself, and that the legislature was without right within the sphere of its powers to make such contract subject to State Mineral Board approval.

*Id.* Thus, although the requirement for the Mineral Board to approve assignments has been embodied in law since 1936, the enforceability and utility of such actions is questionable.

<sup>298</sup> In addition, there was no requirement in the Win or Lose lease period that overriding interests be recorded with the State. These were royalty sharing agreements between and among private parties that, again, had no impact on the State's 12.5% royalty share. This absence of a notification or recordation requirement is likely another explanation for the absence of certain overriding interest records from the State's records.



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### **2. Were these leases the most advantageous leases to the State?**

The question of whether a particular mineral lease is most advantageous to the State is one that delves into the discretion of those with authority to grant the leases. Today, such discretion is exercised by the State Mineral and Energy Board.<sup>299</sup> The SMEB has the benefit of a staff of well-trained scientists, engineers, geographers, and accountants who are able to evaluate the bids and advise the Board as to matters of advantageousness of particular bids to the State.

As noted above, during the examined time period (*i.e.*, 1934-1936), the Governor held the sole and complete discretion as to whether a particular lease should be granted – a reality that carried with it the authority to make discretionary judgment calls regarding whether a particular bid and the resulting lease was the most advantageous bid/lease to the State. Without being able to interview any of the governors that were involved in the leasing from this period, it is impossible to know or understand, to any degree of certainty that a court would be able to review as evidence in a trial, what factors entered into their analyses of the bids related to the Win or Lose Corporation.<sup>300</sup> Some seventy-plus years from the discretionary decisions that led to the granting of the subject leases, the only means to examine the reasonableness (which presumably should provide some insight into the advantageousness) of these leases is to look to the numbers themselves. In furtherance of this goal, data on all leases let by the State for a ten-year period surrounding the subject leases (*i.e.*, five years prior to 1934 and five years after 1936 – or 1929

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<sup>299</sup> La. R.S. 30:127.

<sup>300</sup> An interesting historical side note to this reality comes from the hearsay testimony of Earle J. Christenberry in the *U.S. v. Noe* trial, in which he commented that both Long and Noe, at least with respect to State Lease 309, were convinced that the royalties expected to be generated for the State by that lease would constitute an important economic boon for the State. Thus, whether rightly or wrongly, whether intertwined with self-serving motivations or not, there is indirect evidence that at least one of the Win or Lose leases was considered by elected officials to be in the best interests of the State. *See generally* Testimony of James A. Noe, Trial Transcript, *United States v. Noe*, Docket No. 20,070, at 316-319 (E.D. La.).

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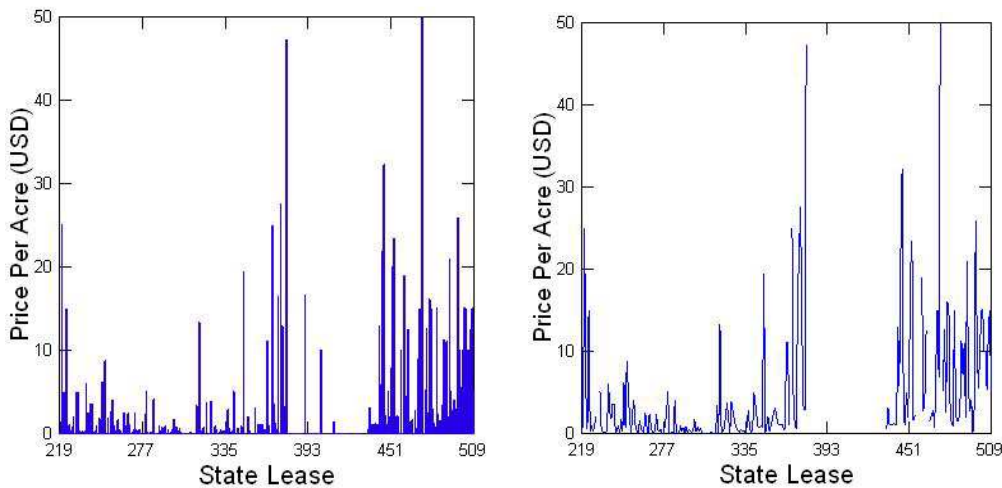
through 1941)<sup>301</sup> were collected and examined using both descriptive and analytical statistics in order to obtain a better understanding of the relationship of these leases to others at the time.

During the period examined, 1929-1941, the State let 267 mineral leases.<sup>302</sup> These leases span the terms of seven governors – Huey P. Long, Alvin O. King, Oscar K. Allen, James A. Noe, Richard W. Leche, Earl K. Long, and Sam H. Jones. These leases also span the creation of the then-State Mineral Board in 1936. The data analyzed for this inquiry include the size (acreage) of the leases and the per acre bid price in order to determine whether the subject leases were significantly inconsistent with other leases at the time.

**a. Price Per Acre Analysis of State Leases 219 Through 506 (1929-1941)**

The overall appearance of the per acre amounts paid for State mineral leases from 1929 through 1941 is represented in Figure 1. The summary statistics for these data are presented in Table 9.

**Figure 1. Both of these graphs (bar and line) were generated using the same data – per acre prices paid to the State for mineral leases between the years 1929 and 1941. All data were acquired from DNR’s SONRIS Web site.**



<sup>301</sup> The period of time captured for this review actually amounts to twelve years, because five years prior to the formation of the Win or Lose Corporation (1934) were examined and five years after the end of Governor Noe’s term in office (1936) were examined, thus providing twelve-years’-worth of data.

<sup>302</sup> These leases are sequentially numbered between State Lease 219 and State Lease 509.

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**Table 9. Summary statistics for the price per acre of State mineral leases between the years 1929 and 1941**

<b>Statistic</b>	<b>Value</b>
Number of Leases	267
Minimum Per Acre Amount (USD\$)	0.000
Maximum Per Acre Amount (USD\$)	412,500.000
Median Per Acre Amount (USD\$)	2.580
Arithmetic Mean (USD\$)	6,273.156
Standard Deviation (USD\$)	34,996.947

On the whole, the data presented in Figure 1 and Table 9 demonstrate that per acre prices for mineral leases from the State during the examined twelve-year period were often quite low in general. This reality is borne out by the median per acre amount for this twelve year period being \$2.58. The problem with the raw data represented in Figure 1 and Table 9 is that they contain outliers. A more accurate representation of the per acre lease price data is presented in Figure 2 and Table 10. The data for this Figure and Table have been stripped of the outliers. Outliers were identified using the Grubbs' test for normality to determine whether any of the values in the dataset were extreme at the 95% (0.05) confidence level. Using this test, only one outlier was identified: State Lease 393.<sup>303</sup> This lease had a per acre price of \$412,500.00 – a statistically significant outlier to the remainder of the dataset. State Lease 393 was not a Win or Lose lease.

**Table 10. Summary statistics for the per acre price of State mineral leases between the years 1929 and 1941 with outliers removed from the dataset**

<b>Statistic</b>	<b>Value</b>
Number of Leases	266
Minimum Per Acre Amount (USD\$)	0.000

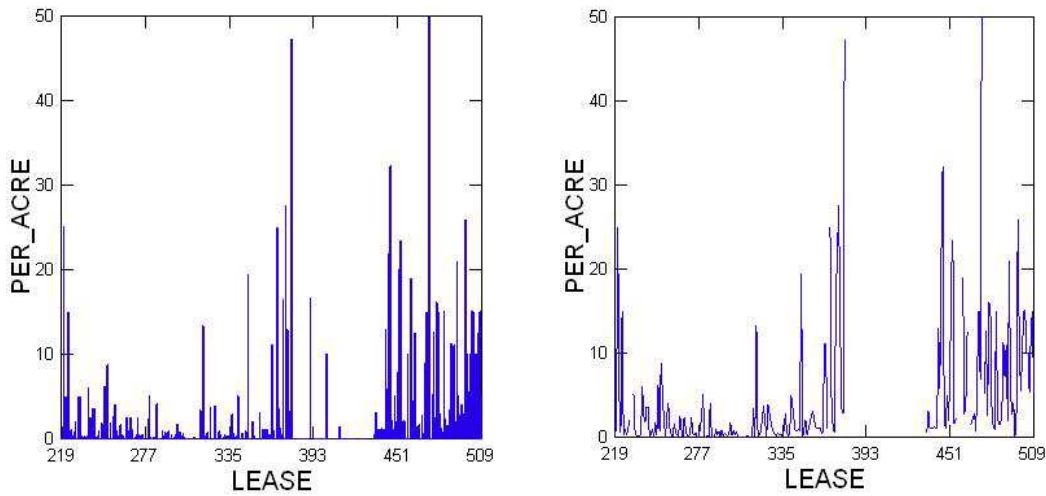
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<sup>303</sup> n=267, Z=3.690, p=0.05.

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Maximum Per Acre Amount (USD\$)	295,627.500
Median Per Acre Amount (USD\$)	2.540
Arithmetic Mean (USD\$)	4,745.987
Standard Deviation (USD\$)	24,583.514

**Figure 2. Both of these graphs (bar and line) were generated using the same data – per acre prices paid to the State for mineral leases between the years 1929 and 1941 with the outliers removed. All data were acquired from DNR’s SONRIS Web site.**



In this situation, although the mean per acre value for the 1929-1941 leases is quite high (\$4,745.99 per acre), the median value of per acre leases is much lower (\$2.54 per acre). As Madrigal has noted, the median value is a more appropriate indicator of the central tendency of data when the data distribution is not normal.<sup>304</sup> Clearly, there is no normal distribution to the per acre values offered for State mineral leases. Thus, the median value is used as a reasonable representative of what typical per acre values were during the 1929-1941 time period.

Beyond the general per acre price trends from 1929 through 1941, the most important matters for the purposes of this report are whether the Win or Lose leases significantly differ in

<sup>304</sup> Lorena Madrigal, *STATISTICS FOR ANTHROPOLOGY*, 34 (Cambridge Univ. Press 1998). In fact, the application of a Kolmogorov-Smirnov one sample test (n=266, maximum difference = 0.425, p=0.000) rejected the null hypothesis that the per acre values paid for State mineral leases between 1929 and 1941 were normally distributed. This lack of normal distribution was also confirmed using the Shapiro-Wilk test (n=266, W=0.191, p=0.000). It is thus clear that the per acre values paid for State leases granted between the years 1929 and 1941 do not follow a normal distribution pattern and that a median value is more indicative of the norm.

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the per acre amounts paid to the State from the other leases of the time. To evaluate this question, the per acre amount paid to the State for each of the Win or Lose leases is compared against the whole dataset for the prices paid per acre for State leases from 1929 through 1941. Because of the non-normal distribution of these data, and because the median value represents a better example of what the typical per acre prices paid during this period were, the Mann-Whitney U test was employed to determine whether each of the subject leases were different from the sample set at a statistically significant level. The results of these tests for all of the Win or Lose leases are presented in Table 11.

**Table 11. Results of Mann-Whitney U tests of statistically significant differences between the 1929-1941 State lease data and the Win or Lose leases when considering the per acre price paid to the State**

State Lease <sup>305</sup>	Per Acre Price (\$)	U score <sup>306</sup>	P value <sup>307</sup>	Significant?
309	0.00	298.0	0.0586	No
315	3.33	162.5	0.9381	No
318	0.07	272.5	0.2214	No
322	3.60	168.5	0.8990	No
332	0.50	231.5	0.4886	No
334	0.38	238.5	0.4429	No
335	0.10	267.0	0.2606	No
336	0.75	216.5	0.5863	No
337	2.85	153.0	1.0000	No
340	0.30	240.5	0.4299	No
341	5.00	181.5	0.8143	No
344	0.64	223.5	0.5407	No
469	0.65	222.5	0.5472	No
495	4.00	171.5	0.8795	No

<sup>305</sup> Data could not be found for State Leases 321, 326, 327, 330, 343. Thus, those leases are not included in this analysis.

<sup>306</sup> The  $n_1$  for these U scores all equal 306 and the  $n_2$  for these U scores all equal 1.

<sup>307</sup> This is the two-tailed P value with a confidence level of 0.05 (95%).

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The data presented in Table 11, without fail, returned results indicating that the per acre prices paid for the leases between 1929 and 1941 that eventually ended up with a portion assigned to the Win or Lose Corporation did not differ, at a statistically significant level (with 95% confidence), from the per acre prices (median) of all of the other leases from this time period.<sup>308</sup> These results strongly suggest that the per acre amount paid to the State for the Win or Lose leases were reasonable at the time based on their lack of deviation from the typical per acre price for State leases at the time. From this suggestion, it is reasonable to deduce that, as to the per acre price paid for the subject leases, the governors granting the leases did not abuse their discretion in granting the leases at these prices.

In an effort to further understand the relationships of the governors' influence over mineral leasing in the years prior to the creation of the State Mineral Board, data were collected and analyzed for the price per acre fetched for mineral leases granted from the inception of mineral leasing in Louisiana in 1915 through 1936. This test also spanned the terms of eight governors: Luther E. Hall (May 14, 1912 through May 9, 1916), Ruffin G. Pleasant (May 9, 1916 through May 11, 1920), John M. Parker (May 11, 1920 through May 13, 1924), Henry L. Fuqua (May 13, 1924 through October 11, 1926), Oramel H. Simpson (October 11, 1926 through May 21, 1928), Huey P. Long (May 21, 1928 through January 15, 1932), Alvin O. King (January 25, 1932 through May 10, 1932),<sup>309</sup> Oscar K. Allen (May 10, 1932 through January 28, 1936), and James A. Noe (January 28, 1936 through May 12, 1936).<sup>310</sup> Leases with available price per

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<sup>308</sup> It should be noted that even when using a Student's t test to examine whether the per acre prices paid for the Win or Lose leases (as a whole) significantly differed from entire dataset for the years of 1929-1941, no statistically significant difference was identified. The results of this two-tailed t test are:  $t=0.8065$ ,  $df=238$ ,  $se=21.504$ ,  $P=0.4208$ .

<sup>309</sup> King did not grant any mineral leases during his three and a half months in office. Thus, he is excluded from this analysis for an absence of data.

<sup>310</sup> Although the State Mineral Board was not created until after Noe's departure from office in 1936, no State mineral leases were granted by Governor Richard W. Leche until after the creation of the State Mineral Board, thus no leases from Leche's term were included in this inquiry.

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acre data for this date range totaled 318 leases. These data were subject to an analysis of variance test (ANOVA), testing the null hypothesis that there is a significant difference among the price per acre fetched by the State for mineral leases granted depending on who was in the governor’s office. The results of that test are presented in Table 12.

**Table 12. Analysis of variance (ANOVA) examining the relationship of State mineral lease prices per acre to governor for the years 1916 through 1936**

<b>Dependent Variable</b>	<b>Size (acreage)</b>
N	318
Multiple R	0.280
Squared Multiple R	0.078

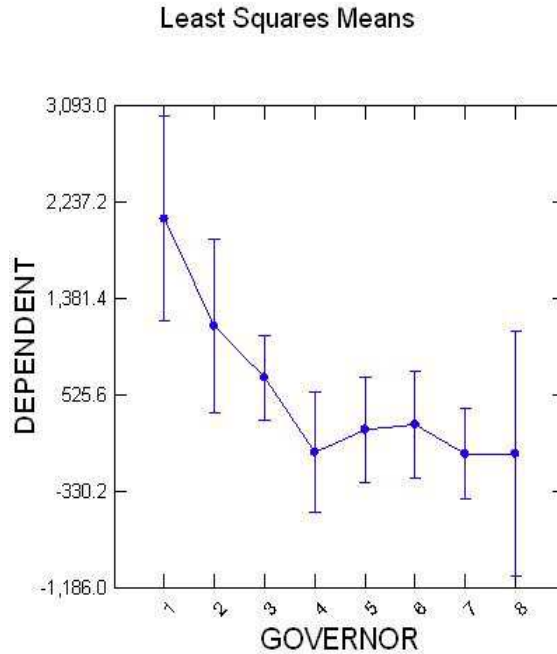
<b>Source of Variation</b>	<b>df</b>	<b>Sum of Squares</b>	<b>Mean Squares</b>	<b>F-ratio</b>	<b>p-value</b>
Governor	7	72,885,626.055	10,412,232.294	3.754	0.001
Error	312	8.599	2,773,871.392		

The data and analyses reported above confirm the null hypothesis that there is a significant difference among the price per acre fetched by the State for mineral leases granted by the Louisiana governors from 1916 through 1936. Although the outcome of this ANOVA identifies statistically significant differences in the price per acre for mineral leases during the period of 1916 through 1936, there appears, as is demonstrated in the figure below, to be skewing of the data from the earliest two governors in the dataset: Hall and Pleasant.

The above below visually demonstrates a substantial difference between the early leasing governors and the rest of the governors. Based upon this apparent skewing of the data, the ANOVA was rerun, with the price per acre data for Governors Hall and Pleasant removed from the analytical dataset. The results of that test are presented in Table 13.

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**Figure 3. Graph of analysis of variance (ANOVA) examining the relationship of State mineral lease prices per acre to governor for the years 1916 through 1936.<sup>311</sup>**



**Table 13. Analysis of variance (ANOVA) examining the relationship of State mineral lease prices per acre to governor for the years 1916 through 1936 with the Hall and Pleasant data removed**

Dependent Variable	Size (acreage)
N	287
Multiple R	0.176
Squared Multiple R	0.031

Source of Variation	df	Sum of Squares	Mean Squares	F-ratio	p-value
Governor	5	20,929,199.149	4,185,839.830	1.798	0.113
Error	281	6.540	2,327,503.913		

The data and analyses of the dataset that does not contain the Governors Hall and Pleasant price per acre data above reject the null hypothesis that there is a significant difference among the price per acre fetched by the State for mineral leases granted by the Louisiana governors from 1916 through 1936. Because of the differing results of these two ANOVA tests

<sup>311</sup> The dependent variable in this graph is the price per acre. The governors, listed in the x axis, are represented numerically in chronological order from Hall (1) to Noe (8).



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on the price per acre data, the results are largely inconclusive regarding whether there was consistency in the per acre price of mineral leases granted by Louisiana’s governors prior to the advent of the State Mineral Board. Nonetheless, with the Win or Lose leases included in both datasets and the latter dataset resulting in a rejection of the null hypothesis, it at least appears that the Win or Lose leases, when considering price per acre, were not inconsistent with other leases in terms of the price per acre fetched by the State at the time.

**b. Size (Acreage) Analysis of State Leases 219 Through 509 (1929-1941)**

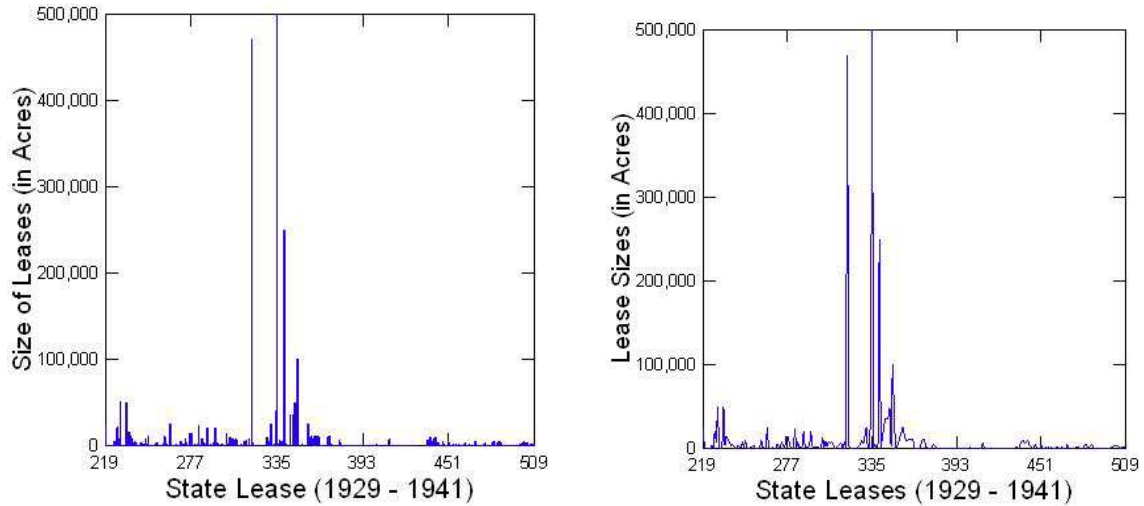
The overall appearance of the size (acreage) of State mineral leases from 1929 through 1941 is represented in Figure 4. The summary statistics for these data are presented in Table 14.

**Table 14. Summary statistics for the size (acreage) of state mineral leases between the years 1929 and 1941**

<b>Statistic</b>	<b>Value</b>
Number of Leases	267
Minimum Size (Acres)	0.012
Maximum Size (Acres)	500,000.000
Median Size (Acres)	500.000
Arithmetic Mean (Acres)	8,543.232
Standard Deviation	45,186.708

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**Figure 4. Both of these graphs (bar and line) were generated using the same data – size (in acreage) of State mineral leases granted between the years 1929 and 1941. All data were acquired from DNR’s SONRIS Web site.**



In this situation, although the mean size for the 1929-1941 leases is quite high (8,543.232 acres), the median value of per acre leases is much lower (500.0 acres). Once again, it is probable that the median value is a more appropriate indicator of central tendency in this scenario due to the absence of a normal distribution of data for the lease sizes.<sup>312</sup> Clearly, there is no normal distribution as to the size of State mineral leases during the sample period. Thus, the median value is used as a reasonable representative of what typical sizes of State mineral leases were during the 1929-1941 time period.

On the whole, the data presented in Figure 4 and Table 14 demonstrate that the size of mineral leases from the State during the examined twelve-year period were often quite low, in general. This reality is borne out by the median size for this twelve year period being 500.0 acres. State Lease 335, with a size of 500,000.00 acres, was identified as an outlier using the Grubbs’ test to determine whether any of the values in the dataset were extreme at the 95%

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<sup>312</sup> Madrigal, *supra*. Using the Shapiro-Wilk test (n=266, W=0.159, p=0.000), it is clear that the size of the State leases granted between the years 1929 and 1941 do not follow a normal distribution pattern. The Kolmogorov-Smirnov one sample test (n=266, maximum difference = 0.425, p=0.000) similarly rejected the null hypothesis that the per acre values paid for State mineral leases between 1929 and 1941 were normally distributed.

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(0.05) confidence level.<sup>313</sup> Unlike the per acre price data analyzed above, although there was an outlier as to the size of the leases (State Lease 335), because that lease is one of the Win or Lose leases, it was not removed from the dataset.

Beyond the general size trends from 1929 through 1941, the most important matters for the purposes of this report are whether the Win or Lose leases significantly differ as to the size of other State leases at the time. To evaluate this question, the size of each of the Win or Lose leases is compared against the whole dataset for the size of State leases from 1929 through 1941. Because of the non-normal distribution of these data, and because the median value represents a better example of what the typical lease size during this period was, the Mann-Whitney U test was employed to determine whether each of the subjective leases were different from the sample set at a statistically significant level. The results of these tests for all of the Win or Lose leases are presented in Table 15.

**Table 15. Results of Mann-Whitney U tests of statistically significant differences between the 1929-1941 State lease data and the Win or Lose leases when considering the size (acreage) of the leases**

<b>State Lease</b> <sup>314</sup>	<b>Size (in Acres)</b>	<b>U score</b> <sup>315</sup>	<b>P value</b> <sup>316</sup>	<b>Significant?</b>
309	500.00	139.5	0.9552	No
315	15.00	212.5	0.4104	No
318	470,000.00	265.5	0.0149	Yes (marginally)
322	500.00	139.5	0.9552	No
332	500.00	139.5	0.9552	No
334	40,000.00	259.5	0.0597	No
335	500,000.00	266.5	0.0075	Yes
336	1,000.00	155.0	0.8432	No

<sup>313</sup> n=267, Z=3.690, p=0.05.

<sup>314</sup> Data could not be found for State Leases 321, 326, 327, 330, 343. Thus, those leases are not included in this analysis.

<sup>315</sup> The n<sub>1</sub> for these U scores all equal 267 and the n<sub>2</sub> for these U scores all equal 1.

<sup>316</sup> This is the two-tailed P value with a confidence level of 0.05 (95%).

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337	5,295.00	213.0	0.4104	No
340	250,000.00	264.5	0.0224	Yes (marginally)
341	1,000.00	155.0	0.8432	No
344	35,000.00	258.0	0.0746	No
469	4,600.00	204.5	0.4702	No
495	200.00	171.0	0.7239	No

The results of the examination of the Win or Lose leases by size are somewhat different from those considering the leases by price paid per acre. In the size examination, three leases, State Leases 318, 335, and 340, were all found to be significantly larger than the other leases issued by the State during the subject time period.<sup>317</sup> Does this finding mean that the governors issuing these leases abused their discretion by issuing leases that were so large as to not be in the best interests of the State? The answer to this question is unclear. Certainly these three leases are significantly larger than all of the others at the time. However, as is set forth below, there were no size restrictions on State leases at the time. Had the per acre price for the leases been significantly lower than others at the time and the lease size been significantly higher, it would be much easier to conclude that such lease terms were unreasonable. However, that is not the case here. The governors had the discretion to grant such large leases and it cannot be said that the State did not get a reasonable price for these large areas. Thus, even for State Leases 318, 335, and 340, it cannot be concluded that the best interests of the State were not served by the granting of unusually large leases.

In an effort to further understand the relationships of the governors' influence over mineral leasing in the years prior to the creation of the State Mineral Board, data were collected and analyzed for the size (acreage) of mineral leases granted from the inception of mineral

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<sup>317</sup> A Student's t test examining whether the size of the Win or Lose leases (as a whole) significantly differed from entire dataset for the years of 1929-1941 also yielded results that differed at a statistically significant level. The results of this two-tailed t test are:  $t=6.6025$ ,  $df=162$ ,  $se=14126.597$ ,  $P=0.0001$ .

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leasing in Louisiana in 1915 through 1936. Unlike the earlier analyses, this test spanned the terms of eight governors: Luther E. Hall (May 14, 1912 through May 9, 1916), Ruffin G. Pleasant (May 9, 1916 through May 11, 1920), John M. Parker (May 11, 1920 through May 13, 1924), Henry L. Fuqua (May 13, 1924 through October 11, 1926), Oramel H. Simpson (October 11, 1926 through May 21, 1928), Huey P. Long (May 21, 1928 through January 15, 1932), Alvin O. King (January 25, 1932 through May 10, 1932),<sup>318</sup> Oscar K. Allen (May 10, 1932 through January 28, 1936), and James A. Noe (January 28, 1936 through May 12, 1936).<sup>319</sup> Leases with available acreage data for this date range totaled 255 leases. These data were subject to an analysis of variance test (ANOVA), testing the null hypothesis that there is a significant difference between the sizes of mineral leases granted depending on who was in the governor's office. The results of that test are presented in Table 16 and represented graphically in Figure 5.

**Table 16. Analysis of variance (ANOVA) examining the relationship of State mineral lease size to governor for the years 1916 through 1936**

<b>Dependent Variable</b>	<b>Size (acreage)</b>
N	255
Multiple R	0.186
Squared Multiple R	0.034

<b>Source of Variation</b>	<b>df</b>	<b>Sum of Squares</b>	<b>Mean Squares</b>	<b>F-ratio</b>	<b>p-value</b>
Governor	7	3.583	5.118	1.261	0.271
Error	247	1.003	4.060		

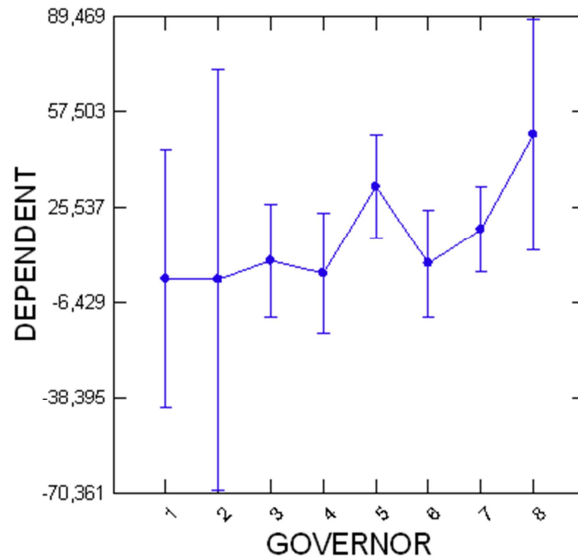
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<sup>318</sup> King did not grant any mineral leases during his three and a half months in office. Thus, he is excluded from this analysis for an absence of data.

<sup>319</sup> Although the State Mineral Board was not created until after Noe's departure from office in 1936, no State mineral leases were granted by Governor Richard W. Leche until after the creation of the State Mineral Board, thus no leases from Leche's term were included in this inquiry.

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**Figure 5. Graph of Analysis of Variance (ANOVA) examining the relationship of State mineral lease sizes to governor for the years 1916 through 1936.<sup>320</sup>**  
Least Squares Means



The data and analyses reported above reject the null hypothesis that there is a significant difference among the size of mineral leases granted by the Louisiana governors from 1916 through 1936. The outcome of this ANOVA suggests that the sizes of the Win or Lose leases (which are included in the analyzed dataset) are not unreasonably large as compared to other leases granted prior to the advent of the State Mineral Board and the advent of size limitations for mineral leases that were instituted by Acts 1936, No. 93.

On the whole, the statistical analyses undertaken as part of this project lead to a conclusion that the Win or Lose leases were not unreasonable based on the other leases that the State granted at the time. There is a bit of uncertainty regarding the meaning of the larger sizes of State Leases 318, 335, and 340. However, it does not seem that a direct line can be drawn between these large sizes and an inference that an abuse of discretion occurred such that the leases were invalid. Clearly as to the price per acre that the State received, there was nothing out

<sup>320</sup> The dependent variable in this graph is the price per acre. The governors, listed in the x axis, are represented numerically in chronological order from Hall (1) to Noe (8).

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of the ordinary when the Win or Lose leases are compared to all of the leases from the subject time period. With the questionable nature of the meaning of lease size results and the suggestion from the per acre price results that the Win or Lose leases were reasonable at the time, it is not possible to say with any certainty that the governors that issued these leases did so on unreasonable terms or abused their discretion in so issuing the leases.

For the purposes of clarity, three variables were not considered in these analyses: royalties, rentals, and bonuses. Royalties were not considered because they remained at a relatively constant 12.5% during this period, thus providing no basis for comparison.<sup>321</sup> Rentals and bonuses were intermittently requested and received during this period and did not really come into vogue as a mandatory component of the State leasing process until after the creation of the State Mineral Board in 1936. Based upon the lack of data and the intermittent nature of the available data for these latter two variables, they were not included in any analyses.

### **3. What size limitations existed on mineral leases at the time?**

The first time size restrictions were imposed on the public officials responsible for issuing leases was in Acts 1936, No. 93 (“Act 93”).<sup>322</sup> The Act added sixteen new sections to the original Acts 1915, No. 30 and repealed all of the previous conflicting provisions.<sup>323</sup> Section 7 of Act 93 prohibited the issuance of leases greater than ten thousand acres. Another amendment to the leasing procedures in 1938 (Acts 1938, No. 80) did not impose additional size limitations on leases. Two years later, in 1940, the Legislature passed Acts 1940, No. 92, which reduced the allowable acreage of new leases by half, from ten thousand to five thousand acres, and this limitation remains unchanged to this day.<sup>324</sup>

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<sup>321</sup> See Table 8, *supra*, and the accompanying text.

<sup>322</sup> See Act 93, Sec. 7. See Appendix 34 for a copy of this Act.

<sup>323</sup> *Id.* at Sec. 25.

<sup>324</sup> See also La. R.S. 30:127 (E). See Appendix 37 for copies of both Acts 1938, No. 80 and Acts 1940, No. 92.

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In the case of the subject leases, the provisions of Act 30 governed the issuance of oil and gas leases on State-owned land. Because Governors Allen and Noe granted the leases prior to the acreage restrictions of Act 93, there were no acreage limitations when the subject leases were issued, thus meaning that the large size of leases such as State Leases 335 and 340 was lawful.

### **F. Public Bribery and Corrupt Influencing**

Some allegations have been levied suggesting that W.T. Burton perhaps acquired the subject leases by way of bribing or unlawfully influencing O.K. Allen and James A. Noe to issue the leases to him (Burton) by agreeing to assign a portion of the royalties to the Win or Lose Corporation. It is possible that such activity occurred, but there is no extant proof that this was the case. Nonetheless, we here review the applicable bribery and corrupt influencing laws and discuss what would be necessary to prove such allegations in this matter.

A general bribery statute was passed in Louisiana in 1878, followed by a similar statute enacted in 1890. In order to constitute public bribery, the bribe given or received must be to influence one of the parties named in Acts 1890, No. 78.<sup>325</sup> However, it is not necessary for the parties involved to have a mutual agreement as to the purpose of the bribe, as long as the defendant alone has that purpose. In *State v. Dudoussat*, the Louisiana Supreme Court held that public bribery according to the 1890 statute is made up of two separate offenses – that of receiving, and that of giving – the bribe to influence one of the parties named in the statute.<sup>326</sup> Finally, the act committed in pursuance of the bribe does not have to be a legal act or an act within the official power and duty of the official bribed; the act only needs to be related to the bribed official's position, employment, or duty.<sup>327</sup>

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<sup>325</sup> J.N.H., *Criminal Law – Bribery of a Public Officer*, 5 L.A.L.REV. 327 (1943). These named parties are: “any officer, State, parochial or municipal, or to any member or officer to the General Assembly.” Acts 1890, No. 78.

<sup>326</sup> 17 So. 685, 687 (La. 1895).

<sup>327</sup> See *State v. Addison*, 64 So. 497, 498-99 (La. 1914).



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Acts 1890, No. 78 embodied the statutory authority relating to bribery of public officials.

The law provided that:

Any person who shall directly or indirectly offer or give any sum or sums of money, bribe, present, reward, promise or any other thing to any officer, State, parochial or municipal, or to any member or officer of the General Assembly with intent to induce or influence such officer, or member of the General Assembly to appoint any person to office, to vote or exercise any power in him vested, or to perform any duty in him required with partiality or favor, the person giving or offering to give, directly or indirectly, and the officer or member of the General Assembly so receiving or agreeing to receive any money, bribe, present, reward, promise, contract, obligation or security, with the intent or for the purpose or consideration aforesaid, shall be guilty of bribery, and on conviction thereof shall be imprisoned at hard labor for not less than one nor more than five years, and fined not less than fifty nor more than five thousand dollars.

Corrupt influencing was considered a separate crime from bribery in 1936. Acts 1920, No. 162 amended part of the original corrupt influencing Acts 1878, No. 59, entitled, “An Act for the prevention and punishment of bribery and corrupt practices in all legislative, judicial, or ministerial offices.”<sup>328</sup> The 1920 version of the Act governed the practices of government officials in the 1930s because the next amendment to the statute was not enacted until Acts 1980, No. 454. The law of corrupt influencing at the time of the subject lease issuances in 1934 through 1936 included the following provision:

That any person who obtains or seeks to obtain money or other things of value from another person upon a pretense, claim, or representation that he can or will improperly influence in any manner, by any means direct or indirect, the official action of any judge,... or other officer of this State, ministerial or judicial...shall be guilty of a felony.

In 1942, the new Louisiana Criminal Code expanded the scope of the corrupt influencing statutes to include parties giving and/or offering bribes, in addition to officials receiving them.<sup>329</sup> Furthermore, in the comments to La. R.S. 14:120, the drafters distinguish the public bribery and the corrupt influencing articles in the following way: “[t]he public bribery section requires only

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<sup>328</sup> Acts 1920, No. 162.

<sup>329</sup> See La. R.S. 14:120; *see also id.*

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that the public official, etc., be bribed for the purpose of influencing him, while the corrupt influencing section requires that the purpose be to influence corruptly.”<sup>330</sup> Thus, although these laws are similar, they are aimed at two different things: the bribery statute is aimed at the act of attempting to influence the official and the corrupt influencing statute is only applicable if the bribe works.

In *State v. Williams*, the Louisiana Supreme Court affirmed the lower courts’ decision to find a defendant guilty of corrupt influencing for accepting a bribe of one hundred dollars in order to influence the conduct of an employee in the office of the Commissioner of Public Utilities to approve the issuance of a certificate of public necessity and convenience.<sup>331</sup> The Court held it was not necessary for the State to prove that the accused employee had the legal authority to issue a certificate of public necessity and convenience, because his position, employment, and duties were connected to the issuance of such certificates, and that his conduct was intended to be influenced corruptly by the bribe.<sup>332</sup>

In the case of bribery, prescription is less of a problem for the State than it is for several other theories articulated herein. Under La. C.Cr.P. Art. 573:

The time limitations established by Article 572 shall not commence to run as to the following offenses until the relationship or status involved has ceased to exist when:

- (1) The offense charged is based on the misappropriation of any money or thing of value by one who, by virtue of his office, employment, or fiduciary relationship, has been entrusted therewith or has control thereof.
- (2) The offense charged is extortion or false accounting committed by a public officer or employee in his official capacity.
- (3) The offense charged is public bribery.<sup>333</sup>

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<sup>330</sup> La. R.S. 14:120, comment.

<sup>331</sup> 35 So.2d 856, 857 (La. 1948).

<sup>332</sup> *Id.* at 858.

<sup>333</sup> La. C. Cr. P. Art. 373.

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This code article would allow the State to instigate public bribery actions against the parties involved in the Win or Lose Corporation if they were still alive. However, although a bribery or corrupt influencing claim by the State may still be viable in theory, a target for such an action is necessary, and all of the individuals that may have participated in such activity are dead. However, as is set forth above, the evidence available at this time indicates that the elements of these legal theories cannot be met. For bribery, the State must show that something of value was given to a State officer in order to influence that officer to exercise some vested power. In the Win or Lose scenario, the vested power would be the granting of a State lease. Presumably the “something of value” would be the promise by W.T. Burton to assign a portion of the granted leases to an entity in which the grantor held an interest (*i.e.*, Win or Lose Corporation). Although such assignments did occur and such a motive can be inferred, there is no proof of such a motive. Indeed, the available information from Noe’s tax evasion trial seems to indicate just the opposite: that Burton was sought out by Long/Allen/Noe as someone with experience in oil and gas operations and as someone with the wherewithal to finance the exploration and production of the Win or Lose leases. Such a scenario substantially undercuts an allegation that Burton bribed public officials to obtain a benefit and no evidence to the contrary exists.

Analyzing substantially similar bribery language in the case of *State v. Duncan*,<sup>334</sup> the Louisiana Supreme Court noted that, although specific intent is required to prove a bribery allegation, such intent may be proven, “by inferences from surrounding facts and circumstances.”<sup>335</sup> Thus, although no direct evidence of bribery exists as to the Win or Lose leases, substantial inference of bribery from the circumstances that could suggest that W.T. Burton bribed public officials to secure the leases. However, as noted above, even the inferential

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<sup>334</sup> 390 So.2d 859 (La. 1980).

<sup>335</sup> *Id.* at 861.

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evidence does not support this possibility. Additionally, because both men are dead, no criminal liability can lie in favor of the State as against these individuals.

The applicability of the crime of corrupt influencing also cannot be said to apply to the Win or Lose situation. As noted above, that law, in the 1930s, was intended to criminalize someone obtaining something of value for a promise to unlawfully influence a public official. There is no indication in the Win or Lose scenario that anyone accepted anything of value on a promise to unlawfully influence the awarding of State leases. In addition, the Win or Lose Corporation, through its later iteration, Independent Oil & Gas Company, was liquidated in 1951, and thus no longer exists as a potential defendant.<sup>336</sup> Thus, this law is irrelevant to the current analysis and is considered no further.

### **G. Extortion**

In an effort to ensure that every possible legal theory applicable to the Win or Lose matter has been examined, we here also review whether the 1930s law related to extortion is applicable to the letting of the Win or Lose leases.

In 1908, the Louisiana Legislature passed Act 110. This Act was passed as an amendment and re-enactment of Acts 1884, No. 63, Sec. 1, entitled, “An act to provide for the punishment of the offense and crime of attempting to extort money or any property or valuable thing, through or by means of threats, threatening letters or communication, or by means of other unlawful acts or devices.”

The law, as amended, reads, in relevant part, as follows:

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<sup>336</sup> It is important to note here, as well, that some concept of extending any potentially available criminal penalties against the corporation (or an individual) to the heirs of that corporation’s interests is likely prohibited by the United States Constitution as an *in personam* forfeiture, which has been identified as a type of bill of attainder. U.S. Const. Art. I, Sec. 9, Cl. 3. See also Bruce A. Baird & Carolyn P. Vinson, *RICO Pretrial Restraints and Due Process: The Lessons of Princeton/Newport*, 65 NOTRE DAME L. REV. 1009, FN 3 (1990).

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If any person shall knowingly send or deliver, ... or shall cause to be received by another any letter, postal card, writing or printed matter, threatening to accuse him or her, or any member of his or her family, or to cause him or her, or any member of his or her family, to be accused of any crime, ... or to charge him or her, or any member of his or her family, with any fault, infirmity or failing, or to publish or make known his or her faults, ... or impair his or her good name, reputation, or credit, ... with intent to extort money, goods, chattels, or any promise or obligations for the payment of money or the transfer or delivery of any money or other valuable thing whatsoever, ... shall be imprisoned at hard labor for not less than one year nor more than twenty years, and shall be fined not exceeding two thousand dollars ...

The wording of Act 110 requires the existence of: (1) the communication of a threat; and (2) the intent to obtain anything of value.<sup>337</sup> Based upon these requirements in the law, it does not appear that extortion is an applicable claim as against the actions alleged to have been undertaken by Governors Allen and Noe, W.T. Burton, or anyone involved with the Win or Lose Corporation. Simply, there is no indication that threats were ever made as against anyone in order to secure the State leases that were ultimately assigned to the Win or Lose Corporation. Thus, although there was clearly an intent by some or all parties involved in these transactions to obtain something of value, there was no threat used (or such threats have been lost to the passage of time) to obtain these things.

In *State v. Logan*,<sup>338</sup> the Louisiana Supreme Court analyzed the ordinary meaning of the word “extortion” and determined the word to mean the taking or obtaining of anything from another by means of illegal compulsion or oppressive exaction. However, the Court stated that the word extortion acquired a technical meaning in the common law, and, in this sense, it may be defined to be the corrupt and unlawful taking by any officer of the law, under color of his office, of any money or thing of value, under color of his office, in excess of what is due to him, or

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<sup>337</sup> Present law establishes the crime of extortion and defines it as the communication of threats to another with the intention to obtain anything of value or any acquittance, advantage, or immunity of any description. *See* La. R.S. 14:66.

<sup>338</sup> 29 So. 336 (La. 1901).

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before it is due to him. Thus, contrary to the impression given by the law above, the Louisiana Supreme Court suggested, in *Logan*, that extortion, when applied to public officers, may be more akin to bribery or corrupt influencing than to the modern or common-sense definition of extortion. However, as it applies to the current matter, the Oppression or Extortion in Office statute found in Act 26 of 1873, reads in relevant part, as follows:

Any judge, justice of the peace, sheriff, coroner, constable, or other civil officer, who shall be guilty of oppression or extortion in the administration or under the color of his office, shall, on conviction, suffer fine or imprisonment, or both, at the discretion of the court.<sup>339</sup>

This definition of the term “extortion in office” clearly lays the penalty for a violation of these prohibited acts at the feet of the public officer in a criminal sense. Thus, a successful prosecution of this law would lead only to a criminal conviction of the dead. Although the criminal acts, if they could be proven, may result in a nullification of the State leases issued pursuant to such extortion, the threshold requirement to prove such violations is through a criminal prosecution of the dead – an impossibility. We do note that, if the jurisprudential interpretation of extortion in *Logan* could be applied in a civil context in an effort to nullify the Win or Lose leases, the burden of proving such extortion may be impossible to meet. Although the Louisiana First Circuit Court of Appeal has noted in *State v. Daniels* that extortion may be inferred from the circumstances (thus eliminating the requirement of actual proof that is absent as to the Win or Lose matter),<sup>340</sup> such a low burden has only been applied to scenarios where actual threats of extortion were made. In the Win or Lose scenario, it is a substantial certainty that no threats were made. The granting of the Win or Lose leases were business transactions. Without threats to obtain a particular result from a public official, the lower burden of the

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<sup>339</sup> It should be noted that only one case could be identified to ever have been reported under this law. *State v. Lubin*, 7 So. 68 (La. 1890). The court in that case did not examine the burden of proof for this offence and one is not provided in the law. Thus, it is unclear as to what is the burden of proof for this offense.

<sup>340</sup> 628 So.2d 63 (La.App. 1 Cir. 1993).

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*Daniels* court seems unlikely and the specific intent of the *State v. Meyers*<sup>341</sup> and *State v. Lewis*<sup>342</sup> cases would be applied to this matter – a burden that cannot be met in this case. In addition, although the Louisiana Supreme Court applied a colloquial interpretation of extortion in the *Logan* matter, the Court did not apply the letter of the law in that case. It is impossible to know if such a lax reading of the law would be followed today. For this reason, we do not believe that any theory of extortion constitutes a reasonable cause of action to invalidate any of the Win or Lose leases.

### **H. Insider Trading**

In addition to the above legal theories, some allegations that the Win or Lose scenario constituted insider trading have been leveled. For this reason, we here review the applicability of such laws to the Win or Lose leases. The central purpose of Louisiana securities law, as enacted by Acts 1920, No. 177, is to prevent fraud in the sale of certain publicly-held securities, to provide for supervision and regulation, and to set penalties for the violation of such laws. This law deals with the use of information in the trade of commodities and securities, not in the letting of minerals leases by a governmental entity. If fact, “insider trading” is defined as, “transactions in shares of publicly held corporations by persons with inside or advance information on which the trading is based.”<sup>343</sup> Neither the State nor Win or Lose constitute publicly-held corporations. Thus, the law related to insider trading from the 1920s is inapplicable to the Win on Lose inquiry.

### **I. Conspiracy**

Among the manifold allegations proffered related to the Win or Lose matter, conspiracy is an oft-repeated refrain. The current criminal law that covers conspiracy is codified at La. R.S.

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<sup>341</sup> 94-231 (La.App. 5 Cir. 9/14/94), 643 So.2d 1275.

<sup>342</sup> 09-783 (La.App. 5 Cir. 5/28/10), 43 So.2d 973.

<sup>343</sup> BLACK'S LAW DICTIONARY, 6<sup>th</sup> ed., 796 (1990).

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14:26. However, that law, which was amended to its current form in 1950, 1977, and 2013, was preceded by one provision that was in force during the Win or Lose period in question: Acts 1934 (3d E.S.), No. 2. This 1934 law criminalized the conspiracy of defrauding the State of taxes and revenues. A conspiracy, in and of itself, simply refers to the collusion of more than one individual to accomplish unlawful activity.<sup>344</sup> Unlike attempt, conspiracy is a stand-alone, actionable crime.<sup>345</sup> As is evident from numerous sources cited herein and otherwise consulted in this research, there is no doubt that more than one person colluded in the Win or Lose activities. Indeed, at one time or another, as many as ten natural or juridical persons may have been involved in the actions that the Win or Lose Corporation undertook with regard to mineral leasing from the State (*i.e.*, Huey P. Long, Oscar K. Allen, James A. Noe, Seymour Weiss, Earle J. Christenberry, Alice Lee Grosjean, William T. Burton, M. S. Rhodes, J. E. Farrell, and the Win or Lose Corporation).<sup>346</sup> Thus, one element of conspiracy is undoubtedly satisfied as to the Win or Lose State leases. However, the inquiry into whether an allegation of criminal conspiracy would lie against the acquisition of the Win or Lose leases must also consider whether a criminal act was accomplished by the above-noted collusion.<sup>347</sup> Because, as has been set forth in several examinations herein, there is no proof that the State was actually defrauded of revenues by the actions of the Win or Lose-related individuals and because no positive law has been identified from the period of inquiry, it cannot now be said that the actions of the individuals associated with Win or Lose constituted criminal acts. In addition, even if such an

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<sup>344</sup> La. R.S. 14:26, comments.

<sup>345</sup> *Id.* See also *State v. Bagneris*, 110 So.2d 123 (La. 1959); *State v. Gunter*, 23 So.2d 305 (La. 1945).

<sup>346</sup> See generally Trial Transcript, *United States v. Noe*, Docket No. 20,070 (E.D. La.).

<sup>347</sup> *State v. D'Ingianni*, 47 So.2d 731 (La. 1950).



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act is considered a criminal violation today, retroactive application of substantive criminal law is impermissible.<sup>348</sup> Therefore, it is doubtful that this law is applicable to the instant scenario.

### **J. Lease Nullification for Immoral Object**

The most viable remaining theory would be that of nullifying the Win or Lose leases on the basis that the agreement to grant such a lease had an immoral object. In *Rosenblath v. Sanders*, the Louisiana Supreme Court made clear that, under article 1892 of the Louisiana Civil Code of 1870, a contract that has an immoral object is void.<sup>349</sup> As previously noted, the current governmental ethics laws were not in place during the relevant time periods. However, the lack of a positive law prohibiting certain action does not necessarily prevent a finding that the actions of Governors Allen and Noe and W.T. Burton were nevertheless immoral, thus resulting in the invalidation of these contracts.

In order to prove a case for immorality, it would first have to be proven that at least a portion of the object of the granting of the leases was to obtain an improper financial benefit or that some law was violated. Obviously, the mere act of entering into a mineral lease agreement is not inherently immoral, but the analysis for this situation is more nuanced than a simple inquiry into whether mineral leasing is, *per se*, immoral. The Louisiana Supreme Court explained this concept of nullity through immorality in the 1866 case of *McGuigin v. Ochiglevich*, stating:

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<sup>348</sup> A discussion of this principle was set forth by the Fifth Circuit Court of Appeals in *Janecka v. Cockrell*: The Ex Post Facto Clause provides that “[n]o state shall ... pass any ... ex post facto law.” U.S. Const. art. I, § 10, cl.1. Although the text of the Ex Post Facto Clause makes clear that it only limits the powers of legislatures, the Supreme Court has acknowledged a similar limitation on the power of the judiciary to render decisions that retroactively criminalize previously legal conduct. *Marks v. United States*, 430 U.S. 188, 191, 97 S.Ct. 990, 51 L.Ed.2d 260 (1977) (holding retroactive application of Supreme Court case violated defendants' due process rights because it punished conduct that had been considered innocent under previous case law); *Bouie v. City of Columbia*, 378 U.S. 347, 353, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964) (holding that “an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law” and is prohibited by the Due Process Clause).

301 F.3d 316, FN 9 (5<sup>th</sup> Cir. 2002).

<sup>349</sup> 150 La. 882 (La. 1922). The laws discussed in this case were the laws in force in 1936.

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It is not pretended that there is anything inherently immoral or essentially criminal in the art of making sails, or in the act of selling canvas. The trade of sail-making is in itself an eminently useful and honorable one; it is indispensable to commerce, to science, to civilization. A contract to supply canvas and sails involves no patent turpitude, like a contract to rob, to murder, to commit arson, to abet treason, which would be on its face iniquitous, and for the enforcement of which the law grants no action. It is obvious, therefore, that a distinction is to be made between contracts immoral sui generis and those the object of which is to supply, or do something which, innocent in itself, is intended by one or both parties to subserve a purpose reprobated by law or by good morals.<sup>350</sup>

With regard to the Win or Lose leases, it is incontrovertible that mineral leasing by the State, in itself, is, as the *McGuigin* court noted “eminently useful.” In order to determine whether the Win or Lose leases fail the test of being moral contracts, an inquiry into the motivations of the lessor (the State, through Governors Allen and Noe, and others) and the lessee (W.T. Burton and James A. Noe) would have to be undertaken. Had this been done during these individuals’ lifetimes, perhaps a similar argument could be made that if Governors Allen or Noe granted a mineral lease to W.T. Burton with the constructive knowledge that the agreement would likely result in a financial benefit solely to themselves, the original contract granting the lease might be void for having an immoral object. However, these motives, while suspected, cannot be supplied or verified. In the absence of such evidence, and with the reality that the State was compensated at the regular royalty rate for the time, these legal theories are not usable as to the current matter.

Today’s version of the law noted in the *McGuigin* case is La. C.C. Art. 2030. This article states that:

A contract is absolutely null when it violates a rule of public order, as when the object of a contract is illicit or immoral. A contract that is absolutely null may not be confirmed.

Absolute nullity may be invoked by any person or may be declared by the court on its own initiative.

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<sup>350</sup> 18 La. Ann. 92 (La. 1866).

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The operative questions for the current matter under La. C.C. Art. 2030 are whether the granting of the leases that eventually became interests held by the Win or Lose Corporation constituted a violation of “a rule of public order” and what would have been the penalty for such a violation. Although this Civil Code article was new when it was passed in 1984, the redactors of the Code indicate that “it does not change the law. It codifies the jurisprudential rule that a contract which contravenes the public order is absolutely null.”<sup>351</sup> It is thus apparent that this article continued the concepts of former Civil Code articles 1891, 1892, 1893, and 1895.<sup>352</sup>

In *Coco v. Oden*,<sup>353</sup> the Louisiana Supreme Court was faced with a situation in which the Sheriff of Allen Parish accepted a free railroad pass.<sup>354</sup> The Court found that, “[t]he contract set up by the defendant is *contra bonos mores*, it is immoral, and it is against the public policy of the state.”<sup>355</sup> In so finding, the Court held that the Sheriff, “forfeited his office by the acceptance and use of such pass.”<sup>356</sup> As one of the potential outcomes of entering into an immoral contract as a result of one’s official position under the law of the 1930s, the *Coco* case provides a useless potential result for the State – O.K. Allen and James A. Noe left public office more than seven decades ago, thus meaning that their forfeit of office would be meaningless.

Some of the situations that would render a contract unlawful because it is against sound morals, public policy, public rights, or public interests include: contracts made with an alien enemy; contracts in general restraint of trade or marriage; contracts for the perpetration, or concealment, or compounding of some crime; considerations impeding the course of public

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<sup>351</sup> La. C.C. Art. 2030, comments. The comment cites *Coco v. Oden*, 79 So. 287 (La. 1918); *Burney’s Heirs v. Ludeling*, 16 So. 507 (La. 1894); *Williams v. Fredericks*, 175 So. 642 (La. 1937); *Ozanne v. Haber*, 30 La. Ann. 1384 (1878); *Gil v. Williams & Davis*, 12 La. Ann. 219 (1857); *Gravier’s Curator v. Carraby’s Executor*, 17 La. 118 (1841) to support the premise that the article did not change the law.

<sup>352</sup> Part VI(C) of this report presents the text and discussion of these former articles.

<sup>353</sup> 79 So. 287 (La. 1918).

<sup>354</sup> *Id.*

<sup>355</sup> *Id.* at 288.

<sup>356</sup> *Id.*

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justice, as dropping a criminal prosecution for a felony, or a public misdemeanor, or suppressing evidence.<sup>357</sup> As discussed above, it is doubtful that, under the law of the 1930s, any of these examples of violations of public morals even exist or are provable in the current matter.

Returning to the matter of whether an act could today be proven to be *contra bonos mores* sufficient to support an annulment of a contract (in this situation, a State mineral lease), the answer is likely in the negative. In *McGuigin v. Ochiglevich, supra*, the Court categorically rejected the idea that mere “intention” would be enough to prove that something was *contra bonos mores*:

The immoral character of the contract does not result from a simple inspection of its terms, but is remotely deduced by a process of reasoning and casuistry involving questions of motive and intention on the part of the vendor, and of knowledge on the part of the vendee. ... The whole inquiry, then, in cases of this kind, would turn upon questions of intention, and the investigation assumes a moral and metaphysical character. Attorneys at law become casuists. The Court is converted into a Synod of Theologians. The authority of Locke and Malebranche supersedes the authority of Pothier and Domat, and the judgment of the Court would present a solution of metaphysical problems, not a juridical sentence. It is obvious to what absurd consequences we are led by the doctrine of “intention” as taught by the lower Court. Civil magistrates should be content to limit their labors to the investigation and enforcement of civil contracts, and not complicate and confuse their duties by entering the labyrinth of subtleties in quest of hidden “intentions.”<sup>358</sup>

Thus, the law presumes that the true intention of parties is clear and explicit on the face of their contracts, and that people, in their business transactions, do not intend to violate the law or to make contracts for the enforcement of which the law refuses a remedy. Hence, as the Louisiana Supreme Court has noted, “when one party charges that the contract is infected with an illegal intent, the burden of proof is imposed upon him to establish this allegation.”<sup>359</sup>

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<sup>357</sup> *Ozanne v. Haber*, 30 La. Ann. 1384 (1878).

<sup>358</sup> 18 La. Ann. 92, 93 (La. 1866).

<sup>359</sup> *Stewart Bros. v. Beeson*, 148 So. 703, 705 (La. 1933).

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This is a particularly problematic scenario for the Win or Lose matter, as evidence of any actual intent is now impossible to acquire. The leases bear no evidence of impropriety on their faces. As indicated in the analyses above, the leases are consistent with the law and with similar leases of the time. Thus, on their face, there is no cause of action by the State to invalidate the Win or Lose leases on the grounds that the leases were a result of immoral actions. Should the courts be willing to eschew the warnings of the Louisiana Supreme Court in *McGuigin* to avoid looking to the metaphysical question of intent to divine immorality, such a situation would be impossible with all of the parties involved in the original transactions now being long-dead. In addition, what the *McGuigin* court clearly articulates is that, absent clear evidence of wrongdoing, a court will not sit in judgment as to the morality of specific acts – such is not a judicial function.<sup>360</sup>

However, as noted above, another basis for annulment is that the contracts were illicit. As has been noted at length in the above analyses, no evidence of illegality exists with regard to these leases.

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<sup>360</sup> See e.g., *City of Shreveport v. Southwestern Gas & Electric Co.*, 74 So. 559 (La. 1917) (noting that it is not a judicial function to pass judgment on the morality of certain legislation). Indeed, in *State v. Smith*, 1999-0606 (La. 7/6/00) 766 So.2d 501, 509-510, the Louisiana Supreme Court implies that morality judgments are left to the Legislature and that the courts should examine acts only in light of those moral judgments made through the enactment of laws. See also *Allen v. Carruth*, 32 La. Ann. 444, 446 (La. 1880), in which the Louisiana Supreme Court notes that its role is in interpreting morality only through the enforcement of the existing law. In this regard, the Court noted:

With the motives of public policy we have nothing to do, in the absence of all restraint on the power of the owner in the terms of the law. If, however, we were at liberty through our views of public policy to go beyond the terms of the statute, we would hold that public morality would best be subserved by enforcing the performance of obligations legally entered into; that the interest of society and of individuals would best be guarded by discountenancing all attempts to procure credit by the renunciation of rights of property, and, after reaping the benefits of the credit, seek to frustrate payment by an attempted exercise of the rights renounced.

In the end, although the bulk of the jurisprudence suggests that courts should not be in the business of making moral judgment calls, it may be that in extreme cases, such does occur. However, it seems unlikely that courts, based upon the jurisprudence noted herein, would become involved in nuanced questions of moral issues.

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### **K. Injury to the Public Fisc**

The Louisiana Supreme Court, as early as 1894, noted that “[a]ll agreements which tend to injure the public service are illegal.”<sup>361</sup> Such a statement would seem to lend credence to the suggestion in the “Dirty Deeds” reports that an injury to the public fisc is an absolute nullity, thus providing the State today with an avenue to attack any Win or Lose-related transactions involving the State that caused a harm to the public fisc.<sup>362</sup> However, this statement in the *Burney’s Heirs* case is immediately followed by the clarification that, “[a]ny agreement, therefore, which contemplates the use of private influence to secure some desired legislation is null and void.”<sup>363</sup> It is thus clear that the *Burney’s Heirs* case recognizes the prohibition of and subsequent nullity of any laws resulting from soliciting the Louisiana Legislature to enact a law that benefits a private interest.<sup>364</sup> In other words, this case is an early example of certain prohibitions on the acts of lobbying and is thus not applicable to the alleged activities raised by the Win or Lose situation.<sup>365</sup>

It is important when considering this proposal from the “Dirty Deeds” reports not to confuse the litany of cases related to taxpayer standing based upon an injury to the public fisc with a cause of action for an actual injury to the public fisc. The former series of cases deal with whether members of the public may bring an action against the government for perceived improper impacts to the public fisc.<sup>366</sup> The latter suggestion is merely that – that an action that causes an injury to the public fisc is, in and of itself, actionable. We can find no cases in

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<sup>361</sup> *Burney’s Heirs v. Ludeling*, 16 So. 507, 516 (La. 1894).

<sup>362</sup> For the purposes of this section, the term “public fisc” is a term of art that is defined by Black’s Law Dictionary (the actual term is “fisc”) as “[t]he public treasury.”

<sup>363</sup> *Burney’s Heirs*, *supra*, at 516.

<sup>364</sup> See also *Gil v. Williams & Davis*, 12 La. Ann. 219 (1857).

<sup>365</sup> William M. Howard, *Validity, Construction, and Application of State and Municipal Enactments Regulating Lobbying and of Lobbying Contracts*, 35 A.L.R.6th 1 (2008).

<sup>366</sup> See e.g., *Stewart v. Stanley*, 5 So.2d 531 (La. 1941); *Upper Audubon Association, et al. v. Audubon Park Commission, et al.*, 329 So.2d 206 (La.App. 4th Cir.1976).

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Louisiana or elsewhere to support this notion. However, it appears that this concept dovetails with the earlier discussed causes of action and does not add anything to the debate over the Win or Lose matter. Further, there is no actual evidence that the Win or Lose-related activities actually negatively impacted the public fisc.

### **L. The Perez Cases**

The series of cases related to Leander Perez and his efforts to obtain and maintain mineral leases from various levee districts in Plaquemines Parish are interesting and are reviewed here based upon suggestions in media reports that such cases may provide a legal mechanism for the State to invalidate the Win or Lose leases. However, the factual distinctions between those cases and the Win or Lose situation is so great as to render any holdings in the Perez cases useless in any effort to rescind the Win or Lose leases.

Leander Perez, like Huey Long, is an almost mythical, larger than life figure.<sup>367</sup> This former judge and the District Attorney for Plaquemines/St. Bernard Parishes is best known today for his bigotry and staunch opposition to integration of the New Orleans area schools in the 1950s and 1960s.<sup>368</sup> However, long before such events, Perez was known as the boss of Plaquemines Parish and he controlled that Parish with an iron fist.<sup>369</sup>

It was within this historical framework and as the District Attorney of Plaquemines/St. Bernard Parishes and the ex-officio attorney for the Buras and Grand Prairie Levee Districts that Perez assisted those districts, in 1936 and 1938, in leasing mineral rights on district property to Delta Development, Inc.<sup>370</sup> Delta Development was a corporate entity that was solely held by

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<sup>367</sup> James Conway, *JUDGE: THE LIFE AND TIMES OF LEANDER PEREZ*, 5 (Alfred A. Knopf 1973).

<sup>368</sup> See generally Glen Jeansonne, *LEANDER PEREZ: BOSS OF THE DELTA* (LSU Press 1977); Adam Fairclough, *RACE & DEMOCRACY: THE CIVIL RIGHTS STRUGGLE IN LOUISIANA 1915-1972* (Univ. of Georgia Press 1999).

<sup>369</sup> Conway, *supra*, at 5.

<sup>370</sup> *Plaquemines Parish Com'n Council v. Delta Development, Inc.*, 486 So.2d 129, 131-132 (La. App. 4 Cir. 1986). See also *Plaquemines Parish Com'n Council v. Delta Development, Inc.*, 502 So.2d 1034, 1041-1042 (La. 1987).

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the Perez family.<sup>371</sup> When challenged on the issuance of these leases by the levee districts in the 1940s, Perez fought back, using political clout to obfuscate the true nature of Delta Development and to intimidate those who would challenge him.<sup>372</sup> Perez went so far as to obtain grand jury indictments of several levee district members, as well as the then-Attorney General, Eugene Stanley, in an effort to fend off inquiries into his issuance of the Delta Development leases.<sup>373</sup> For a time, Perez succeeded in maintaining the leases by continuing as counsel for the levee districts, the parishes, and for Delta Development.<sup>374</sup>

Following Perez's death, Plaquemines Parish (the successor-in-interest to the Buras and Grand Prairie Levee Districts) challenged the validity of the Delta Development leases.<sup>375</sup> The Louisiana Fourth Circuit Court of Appeal dismissed the case against the Perez heirs and assigns, holding that prescription had run, thus the parties could not maintain their action.<sup>376</sup> The Louisiana Supreme Court overturned the Fourth Circuit, noting that Perez's lies to the people and the courts in the 1930s and 1940s and his use of police power to intimidate his opponents constituted a bar to prescription in this matter and the case was allowed to proceed.<sup>377</sup>

Although fascinating cases from a historical perspective, the Fourth Circuit and Supreme Court *Perez* cases from the 1980s hold no real useful mechanisms for the State to challenge the Win or Lose leases. The primary reason for this lack of utility is the reality that these cases are about liberative prescription, a legal theory for the extension of actions that is generally inapplicable to the State under La. Const. Art. XII, Sec. 13.

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<sup>371</sup> *Plaquemines Parish Com'n Council v. Delta Development, Inc.*, 502 So.2d 1034, 1042-1043 (La. 1987).

<sup>372</sup> *Id.* at 1046-1053.

<sup>373</sup> *Id.* at 1051-1052.

<sup>374</sup> *Id.* at 1046-1053.

<sup>375</sup> See generally *Plaquemines Parish Com'n Council v. Delta Development, Inc.*, 486 So.2d 129 (La. App. 4 Cir. 1986) and *Plaquemines Parish Com'n Council v. Delta Development, Inc.*, 502 So.2d 1034 (La. 1987).

<sup>376</sup> *Plaquemines Parish Com'n Council v. Delta Development, Inc.*, 486 So.2d 129, 143 (La. App. 4 Cir. 1986).

<sup>377</sup> *Plaquemines Parish Com'n Council v. Delta Development, Inc.*, 502 So.2d 1034, 1061-1063 (La. 1987).



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When the Delta Development matter returned to the Fourth Circuit in 1997, all but one of the Perez descendants had settled their disputes with Plaquemines Parish.<sup>378</sup> In this case, some substantive issues of relevance to the Win or Lose matter were discussed. However, much of this case related to the original prescription issues – matters already determined inapplicable by the Louisiana Supreme Court and, once again, dismissed by the Fourth Circuit.<sup>379</sup>

The Fourth Circuit did address the issue of whether Leander Perez derogated his fiduciary duty to the levee districts by serving as both the levee districts' attorney and Delta Development's attorney. The court found that such a breach did occur and that the breach caused the leases to be invalid.<sup>380</sup> Although this result seems relevant to the Win or Lose matter, it is not. The *Perez* court rested its decision that Leander Perez breached his fiduciary duty to the levee districts on his position as the attorney for both the levee districts and Delta Development.<sup>381</sup> Such a relationship did not exist in the Win or Lose matter and is thus inapplicable. The fiduciary responsibilities of the governors in the Win or Lose matter were set forth statutorily by way of the Legislature prescribing the minimum royalties and lease terms for mineral leases and the subjecting of such leases to a public bid process. As was noted at length above, there has been found no derogation of these duties in the Win or Lose matter.

Lastly, in the 1997 *Perez* case, the court also examined whether the one remaining Perez descendant, who was not found to be complicit in any of Leander Perez's wrongdoings, was required to,

surrender the overriding royalty interests, and the monies he has derived from them, because those overriding royalty interests originally were acquired by his grandfather's breaches of fiduciary duty.<sup>382</sup>

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<sup>378</sup> *Plaquemines Parish Com'n Council v. Delta Development, Inc.*, 688 So.2d 169, 172 (La. App. 4 Cir. 1997).

<sup>379</sup> *Id.* at 172-174.

<sup>380</sup> *Id.* at 174.

<sup>381</sup> *Id.*

<sup>382</sup> *Id.* at 175.

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The court refused to impute the guilt of the ancestor to the descendant. In this regard, the court stated that, “simply receiving the benefit of a fraud, without more, [does not] make[] one liable for the fraud.”<sup>383</sup> However, the court did go on to note that the Perez descendant would be liable to Plaquemines Parish under a theory of unjust enrichment even though he was not criminally culpable for the fraud.<sup>384</sup> This finding by the 1997 *Perez* court appears, at first blush, to be significant with regard to the Win or Lose matter. However, the conclusion that the Perez heir was liable to Plaquemines Parish based upon his unjust enrichment was premised on the finding that the mineral leases were acquired from the levee districts in a fraudulent manner.<sup>385</sup> The absence of proof of fraud in the acquisition of the Win or Lose leases from the State undermines the application of an unjust enrichment theory in the current matter. Indeed, because, as has been shown herein, the State was not impoverished by the acquisition of mineral leases by the Win or Lose Corporation, there is no unjust enrichment in the first instance. This conclusion is consistent with Judge Plotkin’s concurrence in the 1997 *Perez* matter.<sup>386</sup>

### **VI. Mitigating Factors**

Even the slightest chance that the State could invalidate or revoke the Win or Lose leases under one or more of the above-discussed theories is fraught with legal and logistical problems. This section of the report is a brief examination of the most obvious of those problems – problems that are largely, if not completely, defeating to any attempt to invalidate or revoke the subject leases.

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<sup>383</sup> *Id.*

<sup>384</sup> *Id.*

<sup>385</sup> *Id.* at 176.

<sup>386</sup> *Id.* at 176-177.

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### **A. Evidence Problems**

As has been alluded to in numerous places in this report, the primary obstacle to the State proving any case for wrongdoing with regard to the Win or Lose leases is the lack of evidence. If such wrongdoing occurred, its perpetrators did a good job of not creating a paper trail that could represent a smoking gun from an evidentiary perspective. Thus, should the State bring an action for the revocation of the Win or Lose leases, it is faced with the reality that it has no actual, explicit proof of wrongdoing.

Because the allegation of fraud is the primary charge leveled against the actors in the Win or Lose matter, the proof problems inherent in a successful prosecution of that theory are briefly reviewed.<sup>387</sup> As was mentioned in the review of Perrault's 1941 Memorandum, *supra*, fraud is not presumed and the burden of proving it is high. In *Hall v. Arkansas-Louisiana Gas Co.*,<sup>388</sup> the Louisiana Supreme Court stated that, "[i]t is well settled that one who alleges fraud has the burden of establishing it by legal and convincing evidence since fraud is never presumed, and that to establish fraud exceptionally strong proof must be adduced." In other words, although circumstantial evidence may be used to prove fraud, the mere insinuation and innuendo upon which the current claims of fraud and wrongdoing are based are not enough.

The paper trail in this matter has already been reviewed and has been determined to be insufficient evidence of fraud or any other wrongdoing.<sup>389</sup> In addition, this new and comprehensive review of the available evidence has similarly identified no evidence of fraud or any other wrongdoing. Very simply, there are no inconsistencies in the extant lease (*i.e.*, State Lease 340, 341, and 344) documents that are supportive of a fraud allegation. With no paper trail to demonstrate wrongdoing, the only other real option is live testimony. Thus, in order to

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<sup>387</sup> The proof problems for the other theories reviewed herein are set forth in their respective sections of this Report.

<sup>388</sup> 368 So.2d 984, 993 (La. 1978), *affirmed in part and vacated in part on other grounds*, 452 U.S. 571 (1981).

<sup>389</sup> *See* Perrault Memorandum, *supra*.

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prove fraud, the State would need live testimony of the actors involved in the alleged fraudulent activity. The existing testimony from *U.S. v. Noe* does not evidence any fraud. All potential witnesses are now long dead and thus cannot be interviewed. The lack of evidence of fraud or of any other wrongdoing in this matter is defeating to any nonfrivolous challenge to the Win or Lose leases.

It does appear that the absence of direct evidence is not necessarily a defeating factor to proving bribery under the law in the 1930s. Indirect evidence and inference may be used for this theory. Such evidence and inference is simply the short time frame within which certain State leases were granted to W.T. Burton and then assigned to the Win or Lose Corporation. The inference to be drawn is that such a scenario could have no other purpose than that the assignments were the fulfillment of a promise to compensate Governors Allen and Noe for the awarding of the subject leases to W.T. Burton. One mitigating factor to this theory is that there were no other bidders for any of these leases. If there was a bribe, it is logical to assume that it would be for preferential treatment should multiple bids be received for the same tract. However, such was not the case here. In addition, as noted above, Burton did not need Win or Lose. He was already quite wealthy and was an independently successful oil man. He had no apparent need to bribe Governors Allen or Noe. Quite the opposite, in fact: Long, Allen, and Noe needed Burton to use his extensive resources to support their potentially burgeoning mineral company. This reverse flow of need and resources undermines the use of a theory that Burton bribed public officials to obtain State leases. Instead, it is apparent that the public officials used Burton's resources to acquire the leases and then left him with a small share of the leases as compensation for his troubles. Thus, in the absence of other bidders on the Win or Lose leases and in the absence of even a logical inference of bribery, the bribery claim, while

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present, is extremely weak at best. For the reasons set forth in the next sections, other mitigating factors further undermine the utility of the bribery theory.

### **B. Good Faith of Third Parties**

The Perrault Memo of July 15, 1941, discussed above reviewed the requirements to invalidate certain State leases ostensibly vitiated with several irregularities: the large profits made by the original lessee by the assignment of the lease; bids accepted by the State were typewritten, and the amount of the bid filled in blank places;<sup>390</sup> the executed lease carried no cash consideration as called for by the advertisement; and instances where a corporation in which public officials owned an interest finally received by assignment interests in the leases. Perrault's analysis concluded that, despite the suspicious circumstances surrounding the execution of these leases, such circumstances did not equate to a proof of the existence of fraud. In order to cancel the leases as of their inception, fraud would have to be shown on the part of the present lease holders or that the present lease holders did not acquire in good faith on the face of the public records.

Thus, in order to examine whether the current holders of the Win or Lose leases may be forced to give up those leases based on a lack of good faith, we look to the current law on nullity.

La. Civil Code Art. 2035, provides that:

Nullity of a contract does not impair the rights acquired through an onerous contract by a third party in good faith.

If the contract involves immovable property, the principles of recordation apply to a third person acquiring an interest in the property whether by onerous or gratuitous title.

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<sup>390</sup> It is unclear to the authors of this report why this fact would give someone pause regarding the validity of the leases, but it is cited by Perrault as a concern and we thus repeat it here in the interest of completeness.

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According to the 1984 revision comments, “[t]his Article is new, but it does not change the law.”<sup>391</sup> The comments further note that Article 2035, “merely articulates the doctrines of *bona fide* purchase and the sanctity of the public records.”<sup>392</sup> The Article also,

reflect[s] the public policy in favor of security of transactions by protecting the person who acquires rights through a valid onerous contract from the effects of the nullity of any related contract between different persons.<sup>393</sup>

In fact, this principle has been part of the Louisiana jurisprudence since the 1800s. In *Blanchard v. Castille*, the Louisiana Supreme Court has noted that, “a *bona fide* purchaser, without notice, is not affected by fraud in his vendor, who has a legal title to the property sold.”<sup>394</sup>

In *State v. Hackley, Hume & Joyce*, the State sought to invalidate patents on certain lands because they were obtained by using fraudulent false representations.<sup>395</sup> The State’s prayer in the case was that the patents, by then owned by subsequent holders, be decreed to have been illegally obtained and that they, together with the titles of the defendants, be ordered erased from the records, and that the State be recognized as the owner of the lands and have a judgment rendered against the defendants ordering them to vacate the disputed property. On rehearing, the Court concluded:

Even though the patent itself should be invalid, by reason of the alleged fraud of the patentees, the several titles which constitute the chain of title by which the defendants are alleged to hold may be good, and each of them be an insurmountable barrier to the pretensions of the state. This is so because, where fraud has been committed by the patentee, the government cannot recover the land from a third person who has acquired it for valuable consideration and without notice of the fraud. Therefore, for showing a cause of action against the defendants, it was necessary that the petition should have shown that the

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<sup>391</sup> La. C.C. Art. 2035, cmt. a.

<sup>392</sup> *Id.* See Warren L. Mengis, *Public Records Doctrine Revisited*, Presentation at the 37<sup>th</sup> Annual Louisiana Mineral Law Institute (Louisiana State Univ. 1990) for a discussion of the importance and sanctity of public records in such situations.

<sup>393</sup> La. C.C. Art. 2035, cmt. b.

<sup>394</sup> 19 La. 362, 365 (1841).

<sup>395</sup> 50 So. 772 (La. 1909).

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acquisition of the property under each and every one of these several titles was without valuable consideration, or else with notice of the alleged fraud; in other words, connected these subsequent holders of the title with the fraud by proper allegations, and the petition has not made this showing.

\* \* \*

To say that the defendants are holders in bad faith is not to allege a fact, but merely a conclusion of law. It is merely to say that their title is invalid, and that they know it. A ‘holder in bad faith’ is defined by the Civil Code to be he ‘who possesses as master, but who assumes this quality when he well knows that he has no title to the thing or that his title is vicious or defective.’ Civ. Code, art. 3452.<sup>396</sup>

Notably, bad faith is never presumed. On the contrary, good faith is presumed. In *Breaux v. Broussard*,<sup>397</sup> the Court stated that, “[t]here is no reason to infer bad faith. It devolves upon him who alleges bad faith to prove it. Good faith is presumed. Civ. Code, art. 3481.”<sup>398</sup> To overcome this presumption, it would be necessary to prove that the purchaser acted in bad faith because he had knowledge of the fraudulent circumstances involving the original transaction.

If there is doubt as to the validity of the title from whom he acquires, or if the person so acquiring title has knowledge of such facts as would render the title invalid, he cannot claim the benefit of a possessor in good faith.<sup>399</sup>

The requirements that all of the current right holders in the Win or Lose leases be shown to have been in bad faith at the time that they acquired their rights is, in some cases, an impossibility (due to the death of the acquirers), and in others, highly unlikely (as most of the parties to these leases today relied, in good faith, on the public records that suggested or demonstrated that these leases were valid).

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<sup>396</sup> *Id.* at 775 (internal citations omitted).

<sup>397</sup> 40 So.639 (La. 1906).

<sup>398</sup> *Id.* at 640.

<sup>399</sup> *Franks v. Scott*, 191 So. 175, (La. Ct. App. 1939), citing *Knight v. Berwick Lumber Company*, 57 So. 900 (La. 1912); *Fradella v. Pumilia*, 147 So. 496 (La. 1933), overruled on different grounds, *Rauschkolb v. DiMatteo*, 181 So. 555 (La. 1938).

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With regard to the good faith acquirers mitigating factor, the past actions of the State Mineral Board, the Attorney General's Office, and private litigants are of great import. Over time, the State Mineral Board, whether by resolution or by settlement of litigation, has ratified the validity of the Win or Lose leases. Whether these ratifications were sufficient to undo any wrongdoing that occurred in the acquisition of the leases is immaterial to this inquiry. What is material is the affect that those actions had on the public records and the perceptions of those who acquired interests and invested in the Win or Lose leases subsequent to the ratifications. The effect of the State Mineral Board ratifications cannot be understated. They put all subsequent acquirers of interests in these leases on notice that the State has committed itself to the validity of the leases. Thus, despite any existing rumors of wrongdoing in the granting of these leases, the public records demonstrate, for the reliance of subsequent acquirers, that these leases were and are valid and can be relied upon in good faith. Thus, as a result of these public pronouncements, the current acquirers of interests in these leases are in good faith and their interests cannot be assailed by revoking the leases due to the presumption of good faith discussed above.<sup>400</sup>

If these resolutions were not enough to assuage any concerns of any prospective acquirers of interests in the Win or Lose leases, the several pronouncements of Louisiana's Attorneys General certainly also contribute to the good faith of the current lease interest holders. As is reviewed at length in Part II(B), *supra*, past Attorneys General for the State of Louisiana have examined the Win or Lose leases for irregularities. Some of these examinations revealed inconsistencies. However, in the end, each of these examinations resulted in decisions that the

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<sup>400</sup> See e.g., *Keller v. Summers*, 187 So. 69, 71 (La. 1939) ("good faith is always presumed, until the contrary is shown" in commercial transactions); *Caldwell Lands, Inc. v. Cedyco Corp.*, 2007-1515 (La.App. 3 Cir. 4/2/08), 980 So.2d 827, 829 ("Good faith is presumed" in acquisitive prescription scenarios (*citing* La. C.C. Art. 3481)); *Cahn Bros. & Redmond, Inc. v. Terrebonne*, 289 So.2d 171, 173 (La.App. 1 Cir. 1973) (good faith is presumed in financial transactions).



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inconsistencies were either unverifiable or that, for some other reason, there was no point to invalidating the Win or Lose leases. These decisions, which effectively became public examples of prosecutorial discretionary decisions not to take action for lack of evidence of wrongdoing, further bolster the good faith of today's right holders in these leases.

Although none of the governmental or private litigation regarding the Win or Lose leases ever reached a final judgment by a court, the mere existence of the suits and their lack of finality further suggest that these leases could be relied upon as valid. Probably the most important of these cases in this regard is the litigation against Texaco that resulted, in 1994, in the confection of the Texaco Global Settlement Agreement ("GSA"). This litigation, which garnered the State \$250,000,000.00 in underpaid mineral royalties for many leases that included some of the Win or Lose leases, ensured that the State was made whole from any underpayments of mineral royalties from the Win or Lose leases then held by Texaco, as well as other benefits to the State discussed *infra*. The United States District Court for the Middle District of Louisiana approved the settlement of this litigation and the State Mineral Board approved the settlement and the GSA.<sup>401</sup> These acts, along with the lack of complete prosecution of the other cases involving the Win or Lose leases, certainly stands as a reliable basis for acquiring good faith rights in the Win or Lose leases by any and all subsequent lease interest holders.

Thus, even if the State were able to revoke the Win or Lose mineral leases at issue in this report, it could not invalidate the effects of those leases to the good faith third parties who now hold rights in those leases. This reality would not result in the release of any acreage for its potential renomination for bid and it would not result in a return of any royalties acquired by the lessees, their assigns, or their heirs, as the State has continuously received what it contracted for: a 12.5% (or more) royalty share on any production from the Win or Lose leases.

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<sup>401</sup> See Appendix 38 for copies of relevant *State v. Texaco* documents.

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### **C. The *Texaco* Litigation and its Implications for the Entire Win or Lose Matter**

In the matter of *Texaco Inc., et al. v. Louisiana Land and Exploration Co., et al.*,<sup>402</sup> the State sued Texaco, Inc., in 1987, within Texaco's then-pending bankruptcy suit, alleging that the latter had violated a 1981 settlement agreement between the two parties over natural gas pricing disputes and that Texaco had intentionally underpaid the State for gas from other State leases not included in the 1981 settlement.<sup>403</sup> More broadly, the State alleged that Texaco had been underpaying royalties on gas produced from 44 State leases for approximately 40 years.<sup>404</sup> Among the leases involved in this lawsuit were several leases in which Texaco acquired an interest from W.T. Burton and/or shares of interests from the successors of the Win or Lose Corporation.<sup>405</sup> It is important to note that this case was not brought to attack the actions of or to investigate matters related to W.T. Burton or Win or Lose, but rather to remedy the royalty underpayment allegations of the State as against Texaco.<sup>406</sup> This does not mean, however, that the issues related to W.T. Burton and Win or Lose did not come up during the course of this wide-ranging and complex litigation, they were simply not the focus of this case or of the 1981 *Texaco* litigation.<sup>407</sup>

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<sup>402</sup> Docket No. 88-998-A (M.D. La.).

<sup>403</sup> The 1981 litigation was entitled, *State of Louisiana, ex rel. William J. Guste, Jr., et al. v. Texaco, Inc., et al.*, Docket No. 60407, Sixteenth Judicial District Court, St. Mary Parish. A copy of the Compromise Agreement from that litigation is attached hereto as Appendix 39.

<sup>404</sup> Statement of the Case filed by State of Louisiana, Department of Natural Resources and State Mineral Board, *State v. Texaco*, Docket No. 88-998-A (M.D. La., filed Jan. 8, 1989), at 4-5.

<sup>405</sup> State Leases 334, 335, 340, and 341 were all listed as Louisiana State leases in which Texaco had an interest in a bankruptcy filing by Texaco. Exhibit A to Motion of Texaco Inc. for Order Approving Assumption of Oil and Gas Agreements with State of Louisiana, or Alternatively, Determining that Certain Oil and Gas Agreements are Not Executory Contracts or Unexpired Leases for Purposes of Bankruptcy Code Section 365, *In re: Texaco Inc, et al.*, Docket Nos. 87-B-20142, 87-B-20143, 87-B-20144 (S.D.N.Y., filed Sept. 15, 1987).

<sup>406</sup> See generally Amended and Restated Objection, Amended and Restated Proof of Claim and Complaint of the State of Louisiana, *Texaco Inc., et al. v. Louisiana Land and Exploration Co., et al.*, Docket No. 88-998-A (M.D. La., filed Jul, 21, 1989).

<sup>407</sup> This is a particularly important point, as this case has been referred to in the media reports on the Win or Lose matter as an example of Attorneys General Guste and Ieyoub examining the Win or Lose allegations that are the subject of this report and opting not to pursue them. As is clearly evident from the filings in this case, the alleged wrongdoings of W.T. Burton and the Win or Lose Corporation were not the subject of either this case or of the case that resulted in the 1981 Texaco settlement.

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The *Texaco* litigation, which was instituted in the United States District Court for the Middle District of Louisiana and was associated (but not consolidated) with Texaco's then-pending bankruptcy proceedings in the United States Bankruptcy Court for the Southern District of New York.<sup>408</sup> After several years of litigious maneuvering in both the New York and Louisiana federal courts, the State, Texaco, and several other parties entered into mediation, which concluded in 1994 and resulted in the confection of the Texaco Global Settlement Agreement ("GSA").<sup>409</sup>

The GSA, in addition to settling the State's gas royalty payment dispute with Texaco over the leases subject to the suit for a payment to the State of \$250,000,000.00, also constituted a ratification by the State of the leases subject to the suit.<sup>410</sup> The effect of this ratification constitutes an acceptance of the leases and their terms by the State in 1994. Such an acceptance creates a strong presumption of estoppel for the State to now challenge the substance and terms of those leases.<sup>411</sup> In this regard, it is important to note that the State did not unilaterally ratify these past leases without any consideration. In reality, the ratification was a necessary requirement for the State to gain the benefits of the underpaid royalties (*i.e.*, the \$250,000,000.00 payment). In order to gain the benefits of the leases, the State had to recognize and acknowledge the validity of the leases under which the benefits were to be obtained. Hence, the ratification of the leases was included as a condition of the GSA.

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<sup>408</sup> *In re: Texaco Inc, et al.*, Docket Nos. 87-B-20142, 87-B-20143, 87-B-20144 (S.D.N.Y.). Louisiana's suit was filed prior to Texaco's bankruptcy filing. Statement of the Case, *supra*, at 5. It is also important to note that Texaco did not file its bankruptcy primarily to avoid liability from Louisiana's claims. Rather, the bankruptcy was instituted because Texaco was unable to cover the obligations imposed upon it by the adverse ruling against it in *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987). Statement of the Case, *supra*, at 14-15. With that said, Louisiana's counsel on the Texaco litigation directly alleged that the bankruptcy was also filed in order to avoid certain liabilities under Texaco's leases, including those owed to Louisiana for the underpayment of gas royalties. *Id.* at 15.

<sup>409</sup> A copy of the GSA is attached hereto as Appendix 40.

<sup>410</sup> The cash payment is detailed in the GSA at ¶ 3 and the ratification is detailed in the GSA at ¶ 9.

<sup>411</sup> *See e.g., Frazier v. Harper*, 600 So.2d 59, 62 (La. 1992) (noting the effects of ratification of contracts).

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Thus, it would be a mischaracterization to imply that the State simply ratified the former W.T. Burton and Win or Lose leases (among others) without any reason or recompense. The reason and recompense was a quarter of a billion dollars,<sup>412</sup> an agreement for Texaco to spend an additional \$152,250,000.00 for further development of the mineral reserves covered by their leases,<sup>413</sup> an agreement for Texaco to release 33,000 acres from the Lighthouse Point, Mound Point, and Caillou Island Fields,<sup>414</sup> and tightening Texaco's commitment to adhere to the gas pricing requirements of the 1981 Compromise Agreement.<sup>415</sup>

In addition to the confection of the GSA, the Texaco litigation also resulted in the creation of the Lease Protection Agreement.<sup>416</sup> The Lease Protection Agreement constituted a settlement of certain State claims in the Texaco litigation against the overriding royalty interest owners for State Leases 335, 340, and 341, in which the State reserved the ability to obtain higher royalty rates from these interest holders than had originally been bargained-for by the State when these leases were let under certain circumstances. Through this Agreement, the State acquires a 20% royalty rate for any reassigned portions of these three State leases,<sup>417</sup> an increase in the State's royalty of 7.5% over the original royalty rate for these leases. In exchange for this higher royalty rate, the State, through the State Mineral Board, ratified,

State Leases 334, 335, 340, and 341 and all Subleases thereof, and all sales and assignments of these leases by William T. Burton and his successors in title which have been approved by the State Mineral Board...<sup>418</sup>

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<sup>412</sup> GSA at ¶ 3.

<sup>413</sup> *Id.* at ¶ 4.

<sup>414</sup> *Id.* at ¶ 5. It is important to note that the releases from the Lighthouse Point and Mound Point Fields amounted to releases of acreage from State Lease 340. In addition to these areas, Texaco was also required to release portions of the Rabbit Island, West Cote Blanche Bay, Horseshoe Bayou, and Bayou Sale Fields.

<sup>415</sup> *Id.* at ¶ 7. There were additional concessions by Texaco in the GSA that are too detailed for a meaningful summarization in this document and the reader is referred to the actual language of the GSA for this information.

<sup>416</sup> A copy of the Lease Protection Agreement is attached hereto as Appendix 41.

<sup>417</sup> Lease Protection Agreement at 11.

<sup>418</sup> *Id.*

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Thus, once again, the State Mineral Board ratified W.T. Burton and Win or Lose leases and assignments. This ratification effectively makes these leases, at least as to those individuals in W.T. Burton's chain of title, unassailable by the State today, and considering the effects of undermining or undoing the leases that are discussed below, such a dissolution may cause more harm than good to the State's fisc.

### **D. Returning All Contracting Parties to Their Original Positions**

As a further inquiry into the mitigating factors to the State bringing an action for the invalidation of the Win or Lose leases, it is imperative to consider whether the State would be obligated to return any royalties already received from a voided mineral lease. If the State were to successfully challenge the extant Win or Lose leases, the possible risk of losing already-received mineral royalties and settlement may outweigh the speculative benefits of having the leases voided.

The concern that the mineral royalties received thus far may have to be returned upon the voiding of a lease derives from the general maxim of obligations law that, upon the dissolution of an obligation, the parties must be returned to their original (pre-contract) position.<sup>419</sup> In such a scenario, the State, in order to realize the voiding of the extant Win or Lose leases, would have to return the equivalent of its royalty share to the interest holders in the Win or Lose leases in order to be placed back into the position that it was prior to the leases. This is a problematic prospect when considering whether to advise taking action on these matters. We recognize, however, that it is a realistic impossibility for the State to be returned to its pre-contract position, as its minerals have been depleted (and the State has received royalties for those minerals). Therefore, a strict

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<sup>419</sup> La. C.C. Art. 2018. See also *Shaw Contractors v. ICF Kaiser Engineers, Inc.*, 395 F.3d 533, footnote 27 (5<sup>th</sup> Cir. 2004) (citing *Sliman v. McBee*, 311 So.2d 248, 252 (La. 1975); *Louis Werner Saw Mill Co. v. White*, 17 So.2d 264, 268 (La. 1944); *U.S. v. Maniscalco*, 523 F.Supp. 1338, 1342 (E.D.La.1981)).

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return to the *status quo ante* is impossible in this scenario. Thus, we do not believe that this common maxim is applicable to the current matter.

However, in order to analyze what effect a voiding of the leases would have on the State, we must consider both the law in force in the 1930s as well as the law of today. The Civil Code in force in the 1930s prescribed:<sup>420</sup>

Art. 1892. That [object of a contract] is considered as morally impossible, which is forbidden by law, or contrary to morals. All contracts having such an object are void.

Art. 1893. An obligation without a cause, or with a false or unlawful cause, can have no effect.

\* \* \*

Art. 1895. The cause is unlawful, when it is forbidden by law, when it is *contra bonos mores* (contrary to moral conduct) or to public order.

An obligation, in order to be valid, must not only have a cause, but that cause must be lawful, that is, neither illegal nor immoral, nor contrary to public policy. A cause is illegal when it is forbidden by law. As noted at length above, we can find no indication that the subject leases were granted in violation of the law. However, the inquiry does not stop there. An obligation is immoral, and thus invalid, when it runs counter to the moral standards of the community.<sup>421</sup> Further, an obligation's cause is against public policy when that cause is contrary to values of the community.<sup>422</sup> Contracts made in violation of the law or contrary to the community's moral standards or to public policy are absolute nullities.<sup>423</sup>

As the late Professor Saul Litvinoff observed,

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<sup>420</sup> See *Ronaldson v. Moss Watkins, Inc.*, 127 So. 467 (La. 1930).

<sup>421</sup> La. C.C. Art. 7. See also *Foshee v. Simkin*, 174 So.2d 915 (La.App. 1 Cir. 1969) (an immoral purpose that is not sanctioned by the law is null and void).

<sup>422</sup> Saul Litvinoff, *Still Another Look at Cause*, 48 La. L. Rev. 3, 8-9 (1987).

<sup>423</sup> *Louisiana State Bank v. Orleans Nav. Co.*, 3 La. Ann. 294, 314 (1848) (noting that "laws for the preservation of public order, from the force and obligation of which individuals cannot derogate by their conventions"), citing 7 Toullier, no. 553. 8 Toullier, no. 515. Dunod, Prescription, part 1, ch. 8, p. 47; also see *Britt v. Davis Bros.*, 43 So. 248 (La. 1907).

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[a]s the enforcement of obligations with an unlawful cause would produce results prohibited by the law, or reprobated by morals, or against public policy, the public order is protected when an obligation is deprived of effects because of its unlawful cause.<sup>424</sup>

Under this concept, the right to recover what had been paid on a contract with an unlawful cause depends upon answering the question of which of the parties was knowledgeable of the unlawful nature of the contract. In this regard, the Louisiana Supreme Court has stated that,

[i]f the party who had received were alone dishonest, the sum paid could be recovered back even although the purpose for which it was given had been accomplished. ... But where both parties are chargeable with the same turpitude the law gives no action.<sup>425</sup>

The *Gravier's* Court went on to note that,

[t]he principle has been held to apply not only in relation to the original corrupt or reprobated contract but to any new engagements growing immediately out of it [provided that the new party is aware of the circumstances involving the original illegal transaction].<sup>426</sup>

Assuming, *arguendo*, that the mineral leases issued to the Win or Lose Corporation are affected by absolute nullity because they were confected in violation of former La. C.C. Art. 1893, then it follows that the leases are void and should produce no effect. Under these circumstances, the parties to the agreement (the State and Win or Lose) are to be returned to their original position.<sup>427</sup> In other words, the null mineral leases would revert to the State because municipal corporations cannot be bound by the *ultra vires* act of its officers;<sup>428</sup> and the Win or Lose Corporation and its descendants will be prevented from recovering the royalties that they already paid to the State because of their knowledge and participation in the inception of an

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<sup>424</sup> Litvinoff, *supra*, at 8-9.

<sup>425</sup> *Gravier's Curator v. Carraby's Ex'r*, 17 La. 118, 128 (1841).

<sup>426</sup> *Id.*, citing *Armstrong v. Toler*, 24 U.S. 258 (1824) (“...no principle is better settled, than that no action can be maintained on a contract the consideration of which is either wicked in itself or prohibited by law.”)

<sup>427</sup> La. C.C. Art. 2018.

<sup>428</sup> See *Byrne v. E. Carroll Parish*, 45 La. Ann. 392, 397, 12 So. 521, 523 (1893). This statement assumes, of which we have no proof, that Governors Allen or Noe were acting in an *ultra vires* manner when they granted the subject leases.

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unlawful contract. Thus, although the parties may have to be returned to their original positions upon the failure of an obligation, the State would only have to refund to the heirs of the Win or Lose Corporation any of the royalties recovered if Governors Allen's or Noe's alleged *ultra vires* acts are found to be just that and that the State, itself, is not culpable (by way of acting through its agent) in the issuance of unlawful leases.

The eventuality that the State may have to return royalties is, at this stage, unanswerable. Too many unknown factors are at play with regard to this issue: were the governors' actions immoral?;<sup>429</sup> were the issuances of these leases *ultra vires*?, assuming that the answer to the two previous questions is "yes," is the State, itself, culpable (and thus not subject to the immunity from having to return funds noted above) for the *ultra vires* acts of its agents (*i.e.*, the governors)? Because of the unknowns related to this question, we can make no recommendation as to whether this factor bodes in favor of or against the State in any challenge to the Win or Lose leases.

### **E. Can the State Attack Retroactively Contracts That Have Run Their Course?**

As noted above, many of the W.T. Burton and Win or Lose Corporation leases have lapsed and, even in the extant leases, most of the acreage is no longer held by the Win or Lose leases. One question that has come up during this research is whether the State can retroactively invalidate these lapsed leases should it identify illegalities or other wrongdoing in the acquisition or administration of these leases. This question was directly addressed by Gladney in 1943 and the short answer that he reached was "no."<sup>430</sup> We have re-reviewed this issue and have found no plausible reason to quarrel with Gladney's conclusion 70 years ago.

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<sup>429</sup> Once again, it is important to bear in mind when asking these questions the differing values of the 1930s as noted in the above references to Long, Weinbrenner, Abend, and Berinsky.

<sup>430</sup> Gladney 1943 Memorandum, *supra*, at 13-15.



## ATTORNEY-CLIENT PRIVILEGED COMMUNICATION

The main case cited by Gladney remains good law today and is particularly instructive with regard to this issue. In *State ex rel. Shell Oil Co., Inc. v. Register of State Land Office*,<sup>431</sup> at issue was a mineral lease granted by Governor Noe on his second-to-last day in office to Shell Oil Company.<sup>432</sup> In this case, the State sought to retroactively cancel that mineral lease based upon some errors in the published advertisements related to the leases. However, by the time the State challenged the leases, they had already lapsed. The Court noted that the State had received fair compensation for the leases during their duration and that,<sup>433</sup> under the principle of estoppel, it could not retroactively seek to undo the leases and reap the benefits of that action.<sup>434</sup> In this case, the Louisiana Supreme Court placed considerable weight on the finding of a federal Fifth Circuit Court of Appeals' decision in which, regarding a contract between a public and a private entity, the latter court noted:

In our opinion, the parish, having received the benefits of the contract, is estopped to escape its burdens. In order to recover unearned interest, it would be obliged to return the proceeds of the bonds it had received, and that it does not offer to do. The contract will have to be enforced as the parties made it.<sup>435</sup>

In other words, pursuant to the holding in *Police Jury of Richland Parish* and other cases cited in *State ex rel. Shell Oil Co., Inc.*, the Louisiana Supreme Court has held that, in order to retroactively undo a mineral lease, the State would have to return to the lessee its gains (i.e., royalties, rentals, bonuses, etc.) in order to reap the benefits of cancelling the contract.<sup>436</sup> Thus, because the State would have to return substantial sums to the Win or Lose lessees in order to have those leases invalidated (if there were even grounds for the invalidation of the leases), it

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<sup>431</sup> 192 So. 519 (La. 1939).

<sup>432</sup> *Id.* at 519.

<sup>433</sup> *Id.* at 520.

<sup>434</sup> *Id.*

<sup>435</sup> *Police Jury of Richland Parish v. Caldwell & Company*, 26 F.2d 74, 75 (5th Cir. 1928).

<sup>436</sup> *State v. Shell*, *supra*, at 520-521.

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would be unadvisable and not in the State's best interests to create such a massive liability for itself.

### **VII. Discussion and Recommendations**

#### **A. What Did The State Lose?**

Prior to embarking on an analysis of the possible legal theories to undermine or cancel the Win or Lose leases, and their chances for success, it is crucial to understand what the State has lost through these leases. In other words, how has the State fisc (and, presumably by extension, the people) been injured by the letting of the Win or Lose? This is a particularly important question if, as has been suggested by Professor Ronald J. Scalise, Jr., in the "Dirty Deeds" series, fraud is automatically proven if there is an injury to the State fisc.<sup>437</sup>

The very simple answer to the question of what did the State fisc lose by the letting of the Win or Lose leases is: Nothing. As can be seen in the clear language of the leases, copies of which are attached hereto in Appendices 28 and 31, the State received from these leases a 1/8 (12.5%) royalty share. This royalty share is consistent with historic leases at the time.<sup>438</sup> In addition to the consistency of this amount with the leases at the time of the letting of the Win or Lose leases, a 12.5% royalty for the State was the State-mandated royalty minimum at the time.<sup>439</sup> Thus, not only were the royalty amounts for these leases consistent with historic standards, they were also consistent with the legally-required royalty at the time.<sup>440</sup> Thus, under

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<sup>437</sup> Dirty Deeds, Part 4.

<sup>438</sup> Although this rate may seem, by today's standards, to be low, as is noted at length above, this was the going royalty rate for State leases in the early years of mineral development in Louisiana. The State's share of royalties from its leases has incrementally increased from that 12.5% amount in the early years to an average of 23.3% for the decade preceding this report. See Daryl G. Purpera, Louisiana Legislative Auditor, STATE MINERAL AND ENERGY BOARD MINERAL LEASE ROYALTY RATES INFORMATIONAL REPORT, 2 (2013).

<sup>439</sup> Acts 1926, No. 315.

<sup>440</sup> It is further important to note that, as found by Purpera, *supra*, at 2, the average royalty rate for the time period of 1920-1939 was 13.0% – an insubstantial difference from the 12.5% of the subject leases. This reality suggests that even though 12.5% was the legal minimum at the time, the subject leases were not let at the bare minimum based

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the law and custom of the time, the State received no less than what it was due under the law for these leases. In short, there was no injury to the State fisc in the letting of the subject leases and therefore fraud did not, *ipso facto*, occur in these cases.

Further, under the aforementioned Lease Protection Agreement, entered into by the State and several other parties to State Lease 340 in 1994, the State's royalty share for portions of certain Win or Lose leases has substantially increased.<sup>441</sup> As noted above, the original royalty percentage received by the State for the Win or Lose leases was 12.5%. Under the Lease Protection Agreement, any acreage that is reassigned subsequent to the execution of that Agreement is subject to a 60% increase (*i.e.*, adding 7.5% to the existing 12.5% royalty, for a total of a 20% royalty share) in favor of the State. With regard specifically to State Lease 340, not all of that lease's remaining acreage has been reassigned under the Lease Protection Agreement since 1994, but the majority of it has. Because of this Agreement, of the 75,640 unreleased acres still held by State Lease 340, 41,320 of those acres (or 54.63%) are paying out royalties to the State at 20%, while 34,320 of those acres (or 45.37%) are still paying out at the original 12.5%. This important reality means that it is very difficult to now say that the State fisc is being injured by the continued existence of State Lease 340 and, because the State received its statutory royalty due (12.5%) prior to the execution of the Lease Protection Agreement, it is similarly difficult to say that the State fisc was injured by State Lease 340 between 1936 and 1994.

This finding and conclusion leads necessarily to the question: what is left to sue for with regard to the Win or Lose leases? The answer to this question is not one that has the support of any legal theory that we can identify. The only thing that the State could sue for as to the subject

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upon some side agreement among the relevant parties, but rather they were let at the minimum just like most other leases of their time, regardless of the lessor. *See also* Table 8, *supra*.

<sup>441</sup> A copy of the Lease Protection Agreement is attached hereto as Appendix 41.

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leases is for the hypothetical idea that, had the State not leased to Noe or Burton, it would have enjoyed a better royalty rate offered by some other bidder. In other words, during the gubernatorial terms of O.K. Allen and James A. Noe, the State – today – would have to show that it would have received a more advantageous bid than what it did receive for the Win or Lose leases in order to even begin to call into question the propriety of the letting of these leases. This task is an impossibility. Indeed, in addition to being an impossibility, such a conclusion is simply not supported by the facts from the time. As the Louisiana Legislative Auditor has recently found, the average royalty rate at the time was 13.0%.<sup>442</sup> Thus, the 12.5% that the State received was unlikely to have been outbid or beaten by another bidder during Allen's or Noe's terms as governor.

Based upon these realities, we conclude that, considering the evidence, the State of Louisiana was not swindled and was not cheated by the Win or Lose transactions. The State received what was legally required and customarily due at the time. There is no doubt that the lessees and their assigns and heirs have profited from the Win or Lose leases. There is also no doubt that other lessees have similarly profited in the 101 years that the State has been leasing its lands for mineral exploration and production. This profiting is part of the trade-off of mineral development. The landowner, private or public, reserves (where allowed by law) a share of the proceeds realized from the minerals derived from its land and the lessee, as the party bearing the burden of developing the minerals, retains the remainder of the proceeds. Whether and how these proceeds are divided among lessees, assignees, overriding interest holders, and others is strictly a private matter of no concern to the State. Therefore, considering the leases at issue, as long as the State receives its share of the royalties as required by law and contract (*i.e.*, its State leases), the State has not been injured with respect to the Win or Lose leases.

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<sup>442</sup> Purpera, *supra*, at 2.

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### **B. What could the State get if the Win or Lose assignments are invalidated?**

It is worthwhile to note the effects of invalidations of the assignments to the Win or Lose Corporation. Setting aside for the moment the idea of invalidating the Win or Lose-related leases and focusing only on the assignments to the Win or Lose Corporation, were the State successful, under some theory of law, to invalidate the assignments for the existing Win or Lose leases, those interests would not return to the State. As noted above, the State received, pursuant to the subject lease agreements, its statutorily-mandated royalty share from these leases. The assignments that flowed from W.T. Burton or James A. Noe to the Win or Lose Corporation and others came from the 87.5% interest in the State leases to which the lessees were and continue to be entitled. If any of those assignments fail, the interests that were assigned with them merely revert to the assignor – W.T. Burton and/or James A. Noe (or in this case, their heirs). Thus, the answer to the question of what could the State get if the assignments of the subject leases were invalidated is nothing. Those rights are neither the State's to give nor to receive.

### **C. Can the State get historic royalties if the leases are invalidated?**

This question, which has been insinuated or suggested by the “Dirty Deeds” series, assumes that the State is due unpaid or underpaid royalties from the Win or Lose leases. For the reasons discussed at length above, the State has received and continues to receive at least its legally mandated royalty share (*i.e.*, 12.5%) of mineral production from the Win or Lose leases. Because there is no evidence of the loss of the State's royalty share historically (that has not been accounted for and settled through the GSA and prior or subsequent audit disputes and settlements), the invalidation of the subject leases would not lead to the State receiving a windfall of back royalties to which it was not legally entitled in the first place.

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The most appropriate surrogate law that would appear to provide some guidance in this regard (because there is no law that directly controls this scenario) is the law related to the obligations of good faith and bad faith possessors with regard to products derived during their possession of property. Minerals in the Louisiana Civil Code are considered products which, under La. C.C. Art. 488, should the possessor of the subject property be determined to be possessing without authority are apportioned thusly:

Products derived from a thing as a result of diminution of its substance belong to the owner of that thing. When they are reclaimed by the owner, a possessor in good faith has the right to reimbursement of his expenses. A possessor in bad faith does not have this right.<sup>443</sup>

In order to determine whether a party is in good faith or bad faith, reference must be made to La. C.C. Art. 487,<sup>444</sup> which states:

For purposes of accession, a possessor is in good faith when he possesses by virtue of an act translative of ownership and does not know of any defects in his ownership. He ceases to be in good faith when these defects are made known to him or an action is instituted against him by the owner for the recovery of the thing.<sup>445</sup>

In the Win or Lose situation, the lessee in each case is not a “possessor” in the true sense.<sup>446</sup> Rather, the Win or Lose lessees were quasi-possessors of State property as that term is defined in La. C.C. Art. 3421. The “quasi” possession derives from the reality that these lessees did not possess the actual State land, itself, but rather possessed a real right (*i.e.*, a mineral lease) in the land.

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<sup>443</sup> La. C.C. Art. 488.

<sup>444</sup> La. C.C. Art. 488, cmt. (d).

<sup>445</sup> La. C.C. Art. 487.

<sup>446</sup> La. C.C. Art. 3421 defines “possession” thusly:

Possession is the detention or enjoyment of a corporeal thing, movable or immovable, that one holds or exercises by himself or by another who keeps or exercises it in his name.

The exercise of a real right, such as a servitude, with the intent to have it as one’s own is quasi-possession. The rules governing possession apply by analogy to the quasi-possession of incorporeals.

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As has already been noted above, should the Win or Lose leases be invalidated as being immoral or as having been confected in contravention of public policy, there remains a question as to whether the State would be found to be culpable in such an unlawful transaction such that it would have to return the royalties that it received under the subject leases. However, this result appears to be equitably unfair, as the State's minerals have, without a doubt, been produced and it is impossible for the lessees, in the event of the failure of the Win or Lose leases, to return the actual minerals (*i.e.*, the products). There is, therefore, an unjust enrichment problem inherent in an outcome where the State may have to return royalties from ill-gotten mineral leases, whereby the State, though a party to unlawful contracts, comes out of a dissolution of those contracts as a complete loser.

In this regard, the concepts of good faith or bad faith obligations of quasi-possessors seems to provide a reasonable alternative argument (to a strict unjust enrichment claim) that the State should be made whole again, not just through being able to retain the royalties that it has historically received from the Win or Lose leases, but also that the lessees should have to forfeit most or all of the benefits that they acquired as a result of these leases.

The general principle herein, albeit untested and unreliable, is that, if Governors Allen and Noe had no authority to grant the subject leases, as they were immoral or illegal contracts or contracts that violated public policy, then the Win or Lose lessees were never actual owners of those leases, but mere possessors (whether in good faith or bad faith). Such possession of real rights, as noted above, takes the form of quasi-possession.<sup>447</sup> Following this theory to its end, as

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<sup>447</sup> It is important to note here that although certain real rights can be acquired by way of acquisitive prescription and, had the subject property been private property, the Win or Lose lessees may be able to argue that such prescription has run in their favor, acquisitive prescription does not run against the State. *See State ex rel. Plaquemines Parish School Board v. Louisiana Department of Natural Resources*, 2011-CA-1734 (La.App. 4 Cir. 9/5/12), 99 So.3d 1028, 1034, *writ denied*, 2012-2192 (La. 1/11/13), 107 So.3d 614 (*citing* La. Const. Art. XII, Sec. 13). Thus, the State cannot have ever lost its rights to the property at issue herein by way of the passage of time. As such, this issue is not considered here.

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a quasi-possessor of State rights in good or bad faith, at the end of that possession (*i.e.*, the termination of the leases by way of invalidation), according to the above-noted Code articles, the Win or Lose Corporation would have to reimburse the State for the diminution caused by its possession.<sup>448</sup> If it can be shown that the possession was in good faith, then the Win or Lose Corporation would be permitted to retain some portion of the value of the diminished minerals to cover its expenses in the production of the minerals.<sup>449</sup> It is unclear whether this theory could be viable as a means to recover more than the 12.5% royalty share to which the State was legally entitled under the subject leases and it is doubtful that any good faith subsequent acquirers of the Win or Lose Corporation's interests in the subject leases would be able to be held to account for the unknown sins of the past.

### **D. Likelihood for success**

Most of the legal theories in this report that propose mechanisms for the invalidation of Win or Lose leases are untested and, admittedly, are confected on weak legal bases. Very simply, there is no silver bullet legal theory to undo the actions of W.T. Burton, O.K. Allen, and James A. Noe, nor is it clear that it is in the State's best interests to do so. Much of the reason for the weaknesses of these theories is the much-belabored lack of evidence in this matter necessary to support, much less to prove, a cause of action. In addition to the lack of a clearly-applicable legal theory in this situation, there is no smoking gun in this matter. Did the triumvirate of Huey Long, Oscar Allen, and James Noe collude with William Burton to obtain vast mineral leases on State property? This compelling question can and has led to massive amounts of speculation. However, speculation and insinuation of conspiracy theories does not equate to evidence sufficient to prove a case in a court of law. No documentary evidence has

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<sup>448</sup> La. C.C. Art. 488.

<sup>449</sup> *Id.*



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been identified in more than a year of intensive research on this subject that can serve as a basis for invalidating the Win or Lose leases. Unlike the situation in the 1940s when the Attorney General opted not to bring suit on the Win or Lose leases, we today do not have the benefit of any live witnesses who could testify as to the facts surrounding the acquisition of the Win or Lose leases – they are all dead.

Can information acquired and reported on herein be cobbled together to create a claim that could serve as the basis of a lawsuit to invalidate the subject leases? Perhaps. Virtually anything can be the basis for a lawsuit, whether well-founded or not.<sup>450</sup> However, as we have set forth at length above, insinuation and innuendo do not rise to the level of proof sufficient to support the legal theories available for the invalidation of the Win or Lose leases.<sup>451</sup> Evidence would have to be real and clear. Such evidence has not been identified in such a manner that, as of today, we can say that the State has a cause of action against the lessees, assignees, and overriding interest holders in the Win or Lose leases.

Indeed, the available evidence suggests that the Win or Lose leases were granted in compliance with the law in force at the time rather than through a nefarious scheme to defraud the State. This reality leads to a necessary consideration of one of the apparent motivations for seeking to invalidate the Win or Lose leases in the allegations and stories that led to the creation of this report: the idea that it is somehow unfair that the descendants of Long, Allen, and Noe are profiting today off of actions taken by their ancestors four generations ago. It is understandable that this reality can cause frustration, envy, and consternation for modern Louisianans who happen not to be descended from these individuals. However, the simple concept that this reality is unfair is not a legal basis for invalidating otherwise lawful leases. As the Louisiana Supreme

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<sup>450</sup> Any attorneys participating in such a case will have to make independent judgments regarding the frivolous nature of such suits and their own compliance with the Rules of Professional Conduct.

<sup>451</sup> Even indirect evidence, though of some possible utility in a bribery allegation, is not clear.

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Court has noted, “[e]quitable considerations and estoppel cannot be permitted to prevail when in conflict with the positive written law.”<sup>452</sup> In other words, the perception that the State was cheated by way of the Win or Lose leases, in the absence of any evidence to support such claims, cannot overcome the reality that the subject leases were issued in compliance with the then-existing law. The State, under Louisiana Supreme Court precedent, cannot simply invalidate otherwise valid leases merely because the citizens are now unhappy that the Longs, Allens, and Noes continue to profit from these leases.

This does not mean that, should the State opt to bring an action to invalidate the active Win or Lose leases that it might not be successful.<sup>453</sup> However, based on the reality that the State has not lost any royalties on these leases and based on the lack of evidence and the weakness of the available legal theories, any such suit will be, legally, virtually impossible and practically, unwise. Based upon the difficulty and the complexity of such a case, it is likely not one that could be handled with the current resources of the Attorney General’s Office. Thus, should the State Mineral and Energy Board decide to proceed with such a case, we recommend that funding sufficient to increase staffing or to retain outside counsel to assist in the representation of the State be provided.<sup>454</sup>

In the end, the Attorney General’s Office does not recommend filing suit on this matter. The costs are simply too high for a speculative and doubtful return. Such a suit does not appear to be in the best interests of the State. Nonetheless, the next step rests with the State Mineral and Energy Board to assess this report and its recommendations and, if the SMEB determines that

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<sup>452</sup> *Palermo Land Co., Inc. v. Planning Com’n of Calcasieu Parish*, 561 So.2d 482, 488-489 (La. 1990).

<sup>453</sup> In this regard, and for the reasons set forth in *State ex rel. Shell Oil Co., Inc.*, *supra*, we do not recommend instituting suits to invalidate the inactive Win or Lose leases.

<sup>454</sup> One reminder to note here is that the State cannot issue contingency fee legal contracts in the absence of specific statutory authority to do so. *Meredith v. Ieyoub*, 96-1110 (La. 9/9/97), 700 So.2d 478. There is no such authority here. Thus, proceeding with this case with the assistance of outside counsel will require either sufficient funds to pay hourly rates or a special law to authorize the retention of such counsel on a contingency fee basis.

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such action is appropriate, to formally request that the Attorney General take legal action to invalidate the Win or Lose leases.<sup>455</sup>

### **E. The fiduciary responsibilities of today's State Mineral and Energy Board**

As has been noted in other places, various instrumentalities of the State, especially those that are charged with the management of a portion of the State's revenues as is the SMEB today with regard to mineral revenues,<sup>456</sup> owe a fiduciary duty to the State.<sup>457</sup> This is an important point with regard to the demands made thus far by Messrs. Cressionnie and Billiot (through the "Dirty Deeds" series of stories) who apparently seek legal action from the State to rescind the Win or Lose mineral leases. In the exercise of its fiduciary duty, the SMEB must not only consider the potential sins of the past, but also the effects of any prospective actions taken with regard to the Win or Lose leases. There is little doubt that a legal swipe at the heirs of the Win or Lose fortune would seem to cure a perceived (but not proven) moral injustice. However, as is noted above, the consequences of such an action (i.e., the possible loss of historic bonuses and rentals, etc.) could be significant and may result in substantial negative financial impacts to the State. Further, many of the mineral rights that originally began as part of the Win or Lose matter are now in the hands of third parties with no involvement in the original acquisitions of these interests. The disturbance of these parties' rights would likely be rebuffed by the courts or would constitute contractual interferences for which the State could be financially liable.<sup>458</sup> All of these matters must be weighed by the SMEB as a fiduciary of mineral revenues for the State

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<sup>455</sup> Such a decision is in the sole discretion of the SMEB. However, once and if the matter is referred to the Attorney General, any decision as to whether to file suit shifts to his sole discretion.

<sup>456</sup> See generally La. R.S. 30:121, *et seq.*

<sup>457</sup> See *e.g.*, *Amiss v. State*, 340 So.2d 1085 (La.App. 1 Cir. 1976); La. Atty. Gen. Op. Nos. 77-343, 78-589, and 80-671.

<sup>458</sup> The former possibility is based upon the discussion of the rights of good faith third parties, *supra*. The latter possibility refers to the general tort theories related to the interference with a contract or a business relationship. See *e.g.*, *9 to 5 Fashions, Inc. v. Spurney*, 538 So.2d 228 (La.1989); *Technical Control Systems, Inc. v. Green*, 01-0955 (La.App. 3 Cir. 2/27/02), 809 So.2d 1204, *writ denied*, 02-962 (La. 5/31/02), 817 So.2d 100; *Bogues v. La. Energy Consultants, Inc.*, 46,434 (La.App. 2 Cir. 8/10/11), 71 So.3d 1128.

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before taking any final action and the possibility that taking such action may likely have an adverse impact on the State should be considered.

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